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Limitation of Liability For Maritime Claims

Lin Zou

Proefschrift tot het behalen van het Doctoraat in de Rechten

Promotor: Prof. Dr. Eduard Somers

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ABBREVIATIONS

AMC	American Maritime Cases
CA	Court of Appeal
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CLC	International Convention on Civil Liability for Oil Pollution Damage
CMI	Committee Maritime International
CRISTAL	Contract Regarding a Supplement to Tanker Liability for Oil Pollution
CSO	Company Security Officer
DMF	Le Droit Maritime Francais
DOC	Document of compliance
DOHSA	Death on the High Seas Act
EEZ	Exclusive Economic Zone
HL	House of Lords
HNS	Hazardous and Noxious Substances
IAEA	International Atomic Energy Agency
IMF	International Monetary Fund
IMO	International Maritime Organization (formerly IMCO)
ISM Code	International Safety Management Code
ISOS Code	International Ship and Port Facility Security Code
J. Mar. L. & Com.	Journal of Maritime Law and Commerce
JIML	Journal of International Maritime Law
L.M.C.L.Q.	Lloyd's Maritime and Commercial Law Quarterly
Ll.L.Rep	Lloyd's List Law Reports
LLMC	Convention on Limitation of Liability for Maritime Claims 1976
Lloyd's Rep	Lloyd's Law Reports
MSA	Merchant Shipping Act
NEA	Nuclear Energy Agency
NVOCC	Non-Vessel Operating Common Carrier
OPA	Oil Pollution Act 1990
PFSA	Port Facility Security Assessment
PFSO	Port Facility Security Officer
PFSP	Port Facility Security Plan
RSC	Rules of the Supreme Court
SDR	Special Drawing Right
SI	Statutory Instrument

SMC	Safety Management Certificate
SMS	Safety Management System
SOLAS	International Convention for the Safety of Life at Sea 1974
SSO	Ship Security Officer
SSP	Ship Security Plan
STOPIA	Small Tanker Oil Pollution Indemnification Agreement
TOPIA	Tanker Oil Pollution Indemnification Agreement
TOVALOP	Tanker Owner Voluntary Agreement Concerning Liability for Oil Pollution
Tul. Mar. L.J.	Tulane Maritime Law Journal
Tul.L.Rev.	Tulane Law Review

General Introduction

In the shipping transportation business, there is a special feature that shipowners and similar transporters enjoy the unique privilege of limitation of their liability in respect of claims which are made against them; that is to say, the shipowners and others, under certain circumstances, can limit their overall liability to pay compensation for damage caused by their ships.[1] Limitation of liability, commonly referred to as "global limitation", has been a part of maritime law for a long time. This right arises by operation of law and not by contract. As Lord Denning pointed out in *The Bramley Moore,*[2] "... limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience."

Limitation of liability was deemed to have been developed to encourage the investment of risk capital in maritime adventures by limiting the personal liability of the investor, that is, maritime ventures had to be subsidized. "The basic idea behind the right to limit liability was that every encouragement should be given to shipowners to carry on their business. Going to sea in ships was an adventurous pursuit to be encouraged rather than discouraged in the interests of the promotion and flourishing of international trade."[3] This institution has had an extraordinary vitality and still exists in varying forms in the law of most maritime countries.[4]

On the international plane, there have been certain achievements on the uniformity of limitation regime by the operation of international conventions. Thus, the thesis will discuss various issues of limitation of liability regime within the international framework. In particular, the thesis will focus on the limitation regime in three characteristic countries, i.e., United Kingdom, China and United States since they represent different modes of applying the limitation of liability regime in distinct ways. As will be explored in the following chapters, the U.K. apparently applies the Convention limitation regime, the U.S. adopts a purely domestic regime, while China adopts a selective method (i.e. choose those appropriate convention provisions based on the practical considerations). By a comparative analysis, the substantive and procedural aspects relating to limitation of liability under the laws of these three countries will be examined within the context of international conventions, and some tentative suggestions will be put forward for the modification of the law and the judicial practice.

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[1] See Chorley and O. C. Giles, *Chorley & Giles on Shipping Law*, Pitman Publishing, 8th ed., 1987, p. 394; A.H.E.Popp, *Limitation of Liability in Maritime Law – An Assessment of its Viability from a Canadian Perspective*, 24 J. Mar. L. & Com. 335, 335 (1993)

[2] [1963] 2 Lloyd's Rep. 429, CA

[3] Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, p. 375

[4] In *Ships Are Different - Or Are They?*, [1993] L.M.C.L.Q. 490, Lord Mustill identified six policy reasons underlying limitation of liability: the ideal of the joint maritime adventure exemplified in the law of general average, the risks involved in the carriage of high-value cargo, the need to protect share capital, the risk of ruin without the fault of the shipowner, the need to attract capital into shipping and the perceived general benefit to those that use shipping. For review of the historical basis for limitation of liability, see also the response by Mr. Justice David Steel in *Ships Are Different: The Case For Limitation Of Liability*, [1995] L.M.C.L.Q. 77; for different opinion on limitation of liability, see Dr. G. Gauci, *Limitation of Liability in Maritime Law: an anachronism*, 19 Marine Policy 65 (1995).

For that purpose, we will firstly take a brief review of the historical development of this peculiar limitation of liability system. Afterwards, the history and current situation of limitation regimes of the U.K., China and the U.S. will be briefly introduced.

1 Historical Development of Limitation of Liability

The practice of permitting a shipowner to limit his liability is of uncertain origin.[5] Historically limitation of liability was widely adopted by most European continental maritime jurisdictions from the 17th century, in which it allowed shipowners to limit their liability to the value of the ship and freight.[6] The first major codification of the law was Louis XIV's Marine Ordinance of 1681, which provided that the owners of the ship shall be answerable for the deeds of the master; but shall be discharged by abandoning their ship and freight. This became known as French abandonment system for limitation of liability.

Because of the advantages this system brought about to shipowners, maritime nations around the world felt compelled to adopt it in order to place their own merchant marines on an equal footing with their foreign counterparts. Protection of the national merchant fleet had been well-established rationale for the existence of the limitation system. Thus, over 50 years later, stimulated by the breakthrough case *Boucher v. Lawson,*[7] the English Parliament enacted the 1734 Shipowners' Responsibility Act[8] to respond to the relatively disadvantageous position in which the British shipping industry had been placed as a result of the enjoyment of limitation of liability by its continental competitors. However, unlike the continental statutes, and unlike the later United States Act, the shipowner's limit of liability under the English scheme was based upon the vessel's value prior to the casualty.

In the United States, limitation of liability was first provided in the state legislations of Massachusetts in 1819 and Maine in 1821, both of which were modeled on the 1734 English statute. Later, the case of *The Lexington*[9] initiated the federal legislation,

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[5] Limitation of shipowner's liability is thought to have originated upon the revival of maritime commerce during the Middle Ages in the Mediterranean region, probably around Italy. From there, it extended to the southern ports of France and Spain, ultimately reaching the western and northern ports of the European continent.

[6] See *Main v. Williams*, 152 U.S. 122 (1894), by the common law, as implemented both in England and America, the personal liability of the shipowner for damages by collision was the same as in other cases of negligence, and was limited only by the amount of the loss and by his ability to respond. Similarly, the civil law as well as the general maritime law made no distinction in this particularly in favour of shipowners either. Nor did the ancient laws of Oleron or Visby or the Hanse Towns suggest any restriction upon such liability. Indeed, it is difficult to say when and where the restrictions of the modern law originated. No matter how the practice originated, it appeared, by the end of the seventeenth century, to have become firmly established among the leading maritime nations of Europe. For detailed discussion of the historical background of limitation of liability, see James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 999 (1979)

[7] *Boucher v. Lawson*, (1734) Cas. Temp. Hardw. 85, in which some English shipowners were held personally liable for the full value of a cargo of bullion which had been stolen by the master.

[8] 7 Geo. 2, ch. 15 (1734)

[9] *New Jersey Steam Navig. Co. v. The Merchants' Bank of Boston (The Lexington)*, 47 U.S. (6 How.) 344 (1848), in which the U.S. Supreme Court, upon finding culpable misconduct on the part of the shipowner, held shipowner liable for the loss of a box containing $18,000 in gold and silver coin when

thus in 1851 the American Congress enacted the Limitation of Liability Act.[10][11]

As the domestic laws of more and more maritime nations had provisions limiting the liability of shipowners, steps were taken towards international uniformity. Shipping legislations on the subject of limitation have developed greatly in the 20th century. The first effort to bring about international unity in the field of limitation resulted in a compromise solution, namely, the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-going Vessels 1924 (1924 Limitation Convention), which proved to be a failure.[12] The second international attempt in the domain of limitation of liability is the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships 1957 (1957 Limitation Convention), which came into force internationally as of May 31st 1968.

However, over the years since the limitation system in the 1957 Limitation Convention had brought much litigation relating to the loss of right to limitation and also there was great dissatisfaction with the limits in the Convention due to inflation, the third Limitation Convention – the Convention on Limitation of Liability for Maritime Claims 1976 (1976 Limitation Convention) was adopted and came into force on December 1st 1986.[13] This Convention introduced some radical changes such as establishing much higher limits and an almost unbreakable right to limited liability with the underlying principle to establish a limit of liability that was insurable within the capacity of the insurance market at a cost that could be met at an acceptable level. The Conventions have a common objective of treating the subject of limitation of liability within an international context in order to assure greater uniformity and predictability of legal relationships, as well as a reduction of forum shopping.

Despite the success of the 1976 Convention in achieving a viable compromise, it failed to include a mechanism whereby limits in the convention could be amended by a less formal procedure than the convening of a diplomatic conference. As such, this convention suffers from the same flaw as all its predecessors, namely, within a few years of its adoption it is no longer considered to be acceptable to many states because high inflation has rendered its limits unrealistic.

Therefore, in 1996, the terms of a Protocol to amend the 1976 Limitation Convention

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fire totally destroyed its ship, notwithstanding the contract of affreightment expressly stipulating that carriage was at the shipper's risk.

[10] Act of March 3, 1851, ch. 43, 9 Stat. 635 (codified as re-enacted and amended at 46 U.S.C. 181-189)

[11] By that time there were mainly three limitation systems in existence: The German, the French and English, and the American. All three systems were based on ship's value and freight in the particular voyage. The German limitation system was based upon the premise that there was no personal shipowner's liability for damage caused by the acts of the master or crew, and that therefore the owner had no obligation to the claimants once he had surrendered the vessel and its freight. Under the French and English limitation regimes, the owner was liable *in personam*, but was discharged under French law upon surrendering the vessel and freights to a trustee; in the case of English law, the owner might pay into court the value of the ship and freight without surrendering the vessel itself. For discussion of various limitation regimes in the early times, see Alex. Rein, *International Variations on Concepts of Limitation of Liability*, 53 Tul. L. Rev. 1259, 1261-63 (1979).

[12] The 1924 Limitation Convention came into force on June 2nd, 1931.

[13] 51 countries including most of the leading maritime nations, which possess 49.65% of world tonnage, have adopted the 1976 Convention. See http://www.imo.org. For those who were state parties to the 1957 Convention, they are suggested to denounce the old Limitation Convention.

(1996 Protocol) was agreed upon, and this protocol came into force on 13 May 2004 following 10 States have expressed their consent to be bound by it.[14] Up to now, 28 nations that possess 17.43% of world tonnage have adopted the 1996 Protocol. The aim of this Protocol is to update the amount owners may limit, as the value of the limits agreed in the 1976 Convention have decreased by approximately 59%.[15] Shipowners and their insurers will find that their potential liabilities are substantially increased. The Protocol also changes the procedure for amending the amount shipowners are entitled to limit so as to facilitate a swifter amendment to the limits in the future.

1.1 Limitation of Liability under the U.K. Law

As mentioned above, the 1734 Shipowners' Responsibility Act - the earliest legislation on limitation of liability in England, enacted that no shipowner should be responsible for loss or damage to goods on board the ship by embezzlement and theft of the master or mariners, or for any damage occasioned by them without the privity or knowledge of such owner, further than the value of the ship and her equipment, and the freight which was to be earned on that particular voyage. Later the legislation was extended to cases of robbery by the 1786 Act, and also there was an entire exemption of liability for loss or damage by fire, or for loss of gold and jewelry, unless its nature and value were disclosed. In the 1813 Act, shipowner's limitation of liability was extended to damages arising from negligence and collision. The principle was further extended by the Merchant Shipping Act 1854 to cases involving loss of life and personal injury.[16]

There were subsequent amendments to the Merchant Shipping Acts. The provisions of the 1854 and 1862 Acts regarding limitation were, in substance, reenacted in section 503 of the Merchant Shipping Act 1894, the principal shipping statute of the nineteenth century, in which it was provided that limitation was calculated by reference to the tonnage of the ship regardless of the actual value of the vessel. From the 20th century, English legislations relating limitation of liability have always reacted quickly to modern changes in the international context. The Merchant Shipping (Liability of Shipowners and Others) Act 1958 was enacted mainly to give effect to the 1957 Limitation Convention.[17] Later, limitation of liability was amended and governed by the 1976 Limitation Convention subject to certain reservations. The text of the Convention itself is set out at Schedule 7 to the Merchant Shipping Act 1995 and brought into effect in English law by section 185 of that Act.

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[14] See http://www.imo.org. The countries that have adopted the Protocol have implemented it in different ways. For example, the U.K. has denounced the 1976 Convention upon entry into force of the 1996 Protocol; while Norway will for a certain period of time maintain a parallel system, that is, the 1976 limits will continue to apply, but only for parties from states which have adopted the 1976 convention, but not the 1996 Protocol yet.

[15] Changes have been made to the provisions in the 1976 Convention, which will have the effect of increasing the limits by about 250% on average, and in some instances the increase will be as high as 600% or so.

[16] See Michael Thomas, *British Concepts of Limitation of Liability*, 53 Tul. L. Rev. 1205 (1979)

[17] The United Kingdom was a signatory to the 1957 Limitation Convention. Many of the provisions of the 1957 Convention were incorporated into the 1958 Act by amending section 503 of the 1894 Merchant Shipping Act. See Patrick Griggs & Richard Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p. 5.

As Malta became the tenth State to agree to be bound by the Protocol on 13 February 2004, the 1996 Protocol to the 1976 Convention has therefore, becomes part of English law on 13 May 2004 since the U.K already agreed to be bound by the Protocol.

1.2 Limitation of Liability under the Chinese Law

Prior to the enactment of the Maritime Code in 1992, Chinese law on limitation of liability was quite fragmentary. The first legislation concerning shipowner's limitation of liability is the Provisional Measures on Handling Maritime Affairs promulgated by the Ministry of Transport in 1952.[18] According to the Measures, the maximum compensation of the shipowners shall be limited to the value of the vessel after the accident in the voyage, passage money or freight and insurance amount of the vessel.[19]

In 1959, the Ministry of Transport amended the Measures and promulgated Certain Regulations on Compensation for Maritime Accidents,[20] which maintained the limitation regime based on ship's value but removed the insurance amount of the vessel from the limits of liability. From then on the courts generally followed the Regulations, sometimes together with international customs, to determine the limitation of liability issue of shipowners until the Maritime Code was enacted in 1992.[21] This Maritime Code, keeping in line with prevailing international conventions as well as international practices and in consideration of existing shipping practices in China, introduces a number of radical changes within the Chinese legal system.[22] It contains important substantive rules of maritime law governing the relationships between parties involved in shipping business.

In respect of limitation of liability, the Code mainly adopts the formula in the 1976 Convention although China has not ratified any of the Limitation Conventions. Substantial provisions are borrowed from the 1976 Convention in relation to persons entitled to limit, claims subject to and excluded from limitation, loss of right to limit, limitation fund and etc.[23]

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[18] Before the foundation of the People's Republic of China in 1949, limitation of liability in the Maritime Code of China (adopted in 1929 and came into force on January 1, 1931) was based on the post- casualty ship's value.

[19] This was in line with the international practice at that time since the prevailing Convention on limitation of liability was the 1924 Convention which adopted mixed regime based on both tonnage and ship's value. In addition, China had limited economic power in the early days of foundation, and there were little foreign trade and transport, so the provisions accorded with the situation of China at that time.

[20] The Regulations were promulgated on Sept. 19, 1959, and effective as of Oct. 15, 1959.

[21] After the People's Republic of China was founded in 1949, China began to draft the maritime code. From 1963 when the ninth draft was finished to 1982, the drafting work had been suspended due to the special political situation in China. Then from 1982, the drafting work was resumed till in 1992 the final draft, which contained 15 Chapters with a total of 278 Articles, was submitted to the Standing Committee of the National Congress of the People's Delegates for approval. And the Maritime Code came into force on 1 July 1993.

[22] China is basically a civil law country. Maritime law in China is regarded as a special branch of the civil law, although China has not yet enacted a civil code by now. The principles of civil law will be invoked if the Maritime Code contains no applicable provisions for a particular issue.

[23] It should be noted that the 1976 Convention applies to the Hong Kong Special Administrative Region.

With regard to procedural aspects on limitation of liability in China, the Special Maritime Procedure Law, with the purpose to assist in implementation of the existing Maritime Code, was enacted on December 25, 1999 and came into force on July 1, 2000, in which procedures for the constitution and distribution of the limitation fund was drafted by reference to the corresponding provisions of the 1976 Convention and practices of other countries.[24] This Maritime Procedure Law establishes a detailed framework for dealing with maritime cases in China. Besides, it introduces many important areas of procedure by reference to international convention or practice, and is expected to increase consistency in Chinese maritime law practice. In short, it will have a significant impact on maritime transportation and international trade.

It should be noted that since China operates a civil law system (recently with common law assimilations), *stare decisis* is not recognized and is therefore only of persuasive power. Courts are not bound to follow precedents; the particular judgment binds only the parties involved in the proceedings in which it has been given. Chinese judges are obliged to follow the laws and statutes precisely and cannot deviate therefrom. However, the Judicial Directives (judicial interpretation of law) issued by the Supreme Court, either at its own discretion or at lower courts' requests, play a very important role in the interpretation of law and shall be binding and followed by the Chinese courts. In addition, decisions by the Supreme Court in the leading cases which are deemed appropriate for unifying or guiding the judicial practices of the Chinese courts, approved by the Judicial Committee of the Supreme Court and published in the Circular of the Supreme Court, shall also be followed by the Chinese courts.

It has been over 10 years since the Maritime Code was put into operation. In judicial practice[25] a number of questions have arisen either from an ambiguous wording of original legislation, or from conflicting interpretations of the statutory law in cases concerning similar issues by different courts, or even by different judges within the same court.[26] Currently the Maritime Code is under amendment to clarify those issues, and the Maritime Procedure Law is being tested in judicial practice. We will wait to see how they work to promote the uniform interpretation and implementation of laws in China.

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[24] Other relevant maritime legislations include the Contract Law, General Principles of the Civil Law, Law on Marine Environmental Protection, Civil Procedure Code, and various regulations and rules promulgated by the Ministry of Transport.

[25] China judicial practices are to certain extent influenced by admiralty practices of other maritime nations, in particular, English maritime practices, in the interpretation and application of the maritime legislations.

[26] There are four levels in the Chinese court system, that is, the Supreme People's Court, the Provincial High People's Court, the Intermediate People's Court and the District or County People's Court. A network of maritime courts were established initially in the main coastal cities, i.e. Dalian, Qingdao, Tianjin, Shanghai and Guangzhou in 1984, later on, another five maritime courts were established in Wuhan, Xiamen, Haikou, Ningbo and Beihai respectively. The aim was to create centres of expertise in maritime law. To facilitate the judicial process, some tribunals have been established as well. The maritime courts are of the same level as the Intermediate People's Court, and only take cognisance maritime cases of the first instance. The economic division of the Provincial High Court hears appeals from the Maritime Court and finally to the Supreme Court for re-examination. Although Hong Kong and Macao became Special Administrative Region of China on July 1, 1997 and Dec. 20, 1999 respectively, the maritime law previously in force in Hong Kong and Macao (which was largely U.K. or Portuguese law and practice) has been maintained since the transfer of sovereignty.

1.3 Limitation of Liability under the U.S. Law

America rejected the concept of limitation of liability till the early 19th century despite the fact that limited liability had been a part of the maritime law of most shipowning countries. The earliest American legislation concerning limitation of liability came from Massachusetts and Maine.[27] There was no federal legislation concerning this matter until after the Supreme Court's decision involving *The Lexington*.[28] Because of the uneasiness produced among shipowners by that decision, and also for the purpose of putting American shipowners on an equal footing with other nations, the Congress enacted the Limitation of Liability Act in 1851.[29]

Initially, the Limitation Act was intended to apply only to ocean-going commercial vessels. It expressly provided that the Limitation Act should not apply to "any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."[30] In 1886, Congress amended the Limitation Act and eliminated the specific exceptions enumerated above by broadening the application of the Limitation Act to "all sea-going vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges, and lighters."[31] The intent of Congress was to extend the Limitation Act to all commercial vessels on inland waters. In 1935 and 1936, Congress substantially amended the Limitation Act by providing a supplemental limitation fund for personal injury and death claims in respect of seagoing vessels in § 183(b)-(f).[32] In 1984, Congress amended § 183(b) by increasing the amount of supplemental limitation fund from $60 to $420 per ton.[33]

2 Viability of Limitation of Liability

As discussed above, limitation of liability is a statutory concept peculiar to the shipping industry. It has been originally justified as a commercially practicable device by which the risks of a maritime disaster are reasonably apportioned, and individuals with limited assets other than their vessels are encouraged to invest money in the

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[27] In 1818, Massachusetts enacted a limitation statute entitled "An act to encourage trade and navigation within this Commonwealth"; while in 1821, Maine enacted a similar statute entitled "An act respecting the wilful destruction and casting away of ships and cargo: the custody of shipwrecked goods and trade and navigation".

[28] *Supra* note 9.

[29] *Supra* note 10. This Limitation Act was structured after the limitation of liability statutes of England. To put American shipowning interests on a competitive basis with British interests, subsequent Supreme Court interpretations of limitation gave private American shipowners much more protection than their British counterparts, particularly, the time to measure the value of the vessel for limitation purposes was after the casualty as opposed to the British before-casualty system. Moreover, the Supreme Court determined that any salvage operations to recover a wreck would not affect the valuation, and any hull insurance covering the vessel should not be included in the calculation of the extent of the owenr's interest in the vessel. See *Norwich Co. v. Wright*, 80 U.S. 118 (13 Wall); *The City of Norwich*, 118 U.S. 468 (1886).

[30] 8 Stat. 635 (1851) (current version at 46 U.S.C. 188)

[31] Act of June 19, 1886, ch. 421, § 4, 24 Stat. 80. This was invoked by the owners of the steamship *City of Norwich* in a series of cases beginning with *Norwich & New York Transportation Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871), in 1871.

[32] Actually it was the public outcry resulting from *The Morro Castle* case (1939 AMC 895 (S.D.N.Y.1939), in which a fire destroyed the vessel and caused heavy loss of life and injury, and the residual value was only the vessel's pending freight) that brought about the so-called "loss of life amendments" to the Limitation of Liability Act of 1851.

[33] The Limitation of Liability Act is now codified in 46 U.S.C. 181-189.

development of the national merchant fleet. However, with the development of modern technologies that greatly reduce the risks, the advent of insurance and the corporate form of ownership which provides shipowners with additional ways to insulate their investments from risk,[34] this privilege has been subject to criticism since those original justifications for limitation of liability dissipated.[35] Not a few even suggest that limitation of liability be repealed or the system modified in order to keep up with the changes in our times.

In addition, in the era of consumer-protecting culture, since those who have suffered loss or damage are probably not fully compensated due to limitation regime, it may provoke efforts to break limitation or to provide for higher limits. Particularly, the American system is under severe attack. The Act permits a shipowner to limit his liability to the post-casualty value of the ship so long as there is no privity or knowledge on the part of the shipowner,[36] not surprisingly it could unreasonably lower the shipowner's limits of liability to nominal or zero in a large-scale maritime disaster if the vessel is lost or constructively lost.[37] Furthermore, the shipowners are allowed to litigate all claims against it in the often more favorable forum of a federal court instead of a hostile state court since federal courts have exclusive admiralty jurisdiction to determine whether the shipowners are entitled to limit.[38]

Hence, the right to limit has been accorded a grudging and narrow construction by the judiciary in many maritime nations. The courts always try to find a way of breaking limitation if the aggregate of the claimed sums exceeds the limits. As Mr. Justice Sheen has said: "The Lords have taken away that which by statute the law gave to

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[34] With respect to the continued validity of the Limitation Act, the American court in *Baldassano v. Larsen*, 580 F. Supp. 415, 1985 AMC 2527 (D. Minn. 1984) stated: "Indeed, many of the conditions which led to the Act's passage do no longer exist. Individual and syndicate ownership of vessels has yielded to corporate ownership, which, with its own form of limited liability, makes the statute's protection of less importance. Insurance coverage—including hull and cargo and liability insurance – has expanded greatly. It may well be that the greatest beneficiaries under the Act today are not, as was intended, ship builders and owners, but rather insurance companies who are able to collect full premiums while limiting their liability to the value of the vessels."

[35] As to the justification for protection of national merchant fleet, it was alleged that other means instead of limitation of liability should be available. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437, 74 S. Ct. 608, 623, 1954 AMC 837, 859 (1954), the former U.S. Supreme Court Justice Black pointed out when criticizing judicial expansion of the U.S. Limitation of Liability Act of 1851, "[m]any of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons. If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost."

[36] See 46 U.S.C. 183. The phrase of "privity or knowledge" of the shipowner is the standard of conduct to deprive of shipowners' right to limitation, which has been frequently invoked by the American courts to curtail shipowners of this privilege. For more detailed discussion on this standard, see Chapter 5 on Conduct Barring Limitation.

[37] E.g., in *The Titanic*, 233 U.S. 718 (1914), the vessel was a total loss, and the residual value was merely some lifeboats salved and pending freight in passage monies. In *The Torrey Canyon*, 281 F.Supp. 228 (S.D.N.Y. 1968), modified, 407 F.2d 1013 (2d Cir. 1969), the stranding tanker was bombed and sunk to reduce the pollution damage. So the limitation fund came eventually to the value of one salvaged lifeboat despite heavy claims brought on the shipowner.

[38] See Jill A. Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?*, 24 Tul. Mar. L.J. 659, 661-662 (2000). The American attitude towards limitation of liability is somewhat bewildering. Nowhere has opposition to it been stronger, but surprisingly little has been done to adapt the American system to modern conditions. The 1851 statute, as far as property claims are concerned, has remained almost unchanged to this day.

shipowners."[39]

So far, much criticism has been directed against the limitation regime for many years, from many quarters, and for many reasons. However, although the limitation system has been criticized as antiquated, it has not outlived its usefulness. There are other considerations as valid foundation for retaining the system.

The most powerful argument for the retention of limitation of liability is that it would be very difficult to obtain any insurance coverage in respect of claims which are not protected by limitation of liability. The concept of insurability was recognized as a viable foundation for limitation.[40] Indeed, it has been argued that the insurance industry relies on the principle of limitation of liability. Marine liability policies are written on the general premise that shipowners have the right of limitation and that such limitation will indirectly benefit underwriters. More importantly, the commercial marine insurance market has a limited capacity at realistic rates. The insurable limit is the maximum amount of overall coverage available at a realistic cost in respect of any one catastrophe. The concept of unlimited liability ignores the problem of realistic insurable limits.[41]

Thus, when injury and damage are incurred in connection with the operation of ships, particularly in cases of maritime disasters, it is of the greatest importance that some form of limitation be preserved to keep shipowners' liabilities within economically insurable limits (also for avoiding the inconvenience of other means of protection such as one-ship company) and thereby to ensure that a fund is available to claimants in all cases. Any withdrawal of the protection of limitation of liability would inevitably increase insurance costs to the detriment of not only shipowners, but also shippers of cargo by higher freight rates and ultimately the potential consumers.[42]

Notably, the effect of insurability on the limitation of liability is well demonstrated by the transition of the calculation of limitation. Originally, the shipowner's limit of liability was based on the value of the ship; however, over the years limitation came to be calculated on the basis of the particular vessel's tonnage. Frequently, the value per ton is based on the rate set by the prevailing international convention and no longer has anything to do with the supposed value of the ship, but rather with what insurance coverage is available at reasonable cost.

As limitation of liability increases the facilities for getting adequate insurance and

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[39] See generally Sheen, *Limitation of Liability: The Law Gave and the Lords Have Taken Away*, 18 J. Mar. L. & Com. 473 (1987); Gotthard Gucci, *Limitation of liability in Maritime Law: an anachronism?*, 19 Marine Policy 65 (1995).

[40] Interestingly, insurance of marine risks also contributes to outdate the limitation system, since, in a sense, marine insurance may replace the limitation system to serve the same purpose of risk spreading.

[41] See Leslie J. Buglass, *Limitation of Liability from a Marine Insurance Viewpoint*, 53 Tul. L. Rev. 1364 (1979).

[42] Historically, British limitation of liability has been influenced by the development of a well-established marine insurance industry. The original British system was fundamentally different from the Continental system; for example, the limitation unit was any "distinct occasion" giving rise to liability, which was clearly inspired by the development of marine insurance. The British system, adapted to the concept of insurability, provided a plausible justification for the continued special protection of the shipping industry. In this sense, the British tonnage system that considers modern insurability should prevail the outmoded abandonment system or American system. See, Alex Rein, *International Variations on Concepts of Limitation of Liability*, 53 Tul. L. Rev. 1259 (1979).

reduces the costs of such insurance, the limits should be high and thus greatly reduce the incidence of limitation being invoked.[43] One good example is the 1976 Convention which was drafted based on the commercial insurability. Its 1996 Protocol that further raises the limits would certainly produce a more acceptable result from a policy viewpoint, and a more predictable legal regime which would impact on insurance premiums.

In a word, abolition of the right to limit is not a realistic solution. The cost of the resulting uncertainties to claimants seems to be an overriding concern. Limitation of liability accords with commercial reality and allows some certainty in calculating the risks involved for the provision of insurance. Notwithstanding the criticism, the inequities, and the escape routes crafted by the courts, the concept is still deemed by many maritime nations as a necessary component of the international maritime legal regime.

Apart from the consideration of insurability, another important reason for maintaining limitation of liability is probably the procedural aspect in the limitation actions. In the limitation proceedings all claims are brought together against the same limitation fund so that an equitable allocation of damages can be achieved.[44] The right to have one court, using one law and one procedure, to hear all claims arising from the casualty is another important consideration for supporting the right to limit in the long run.[45]

Limitation of liability remains vital and useful, particularly in a serious maritime casualty. To date, the fact that more and more countries have adopted limitation provisions in their respective domestic legislations which generally reflect international conventions is further support for its validity and reasonableness. Its adverse effects can be offset by proper insurance.[46] In the hands of skillful maritime judges, limitation remains to be sensible, economical, and fair means of litigating and resolving complex maritime cases. Combination of its venerable traditions in the maritime law of most countries and the rational arguments for not discarding it until one knows another better alternative solution will probably work to give it a long future.

However, in international negotiations on limitation of liability, it is hard to achieve the required consensus on a global limitation regime operating under uniform rules and universally applied that will guarantee widespread acceptance and thus result in the desired international uniformity.[47] Notwithstanding that, we still need to find solutions in achieving uniformity of international law in order to facilitate relations

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[43] See Alex Rein, *International Variations on Concepts of Limitation of Liability*, 53 Tul. L. Rev. 1259, 1272, (1979)

[44] See Graydon S. Staring, *Limitation Practice and Procedure*, 53 Tul. L. Rev. 1134 (1979).

[45] See Lynn N. Hughes, *The Shipowners' Right to a Limitation of Liability Adrift on a Sea of Tort Changes*, L.M.C.L.Q. 517, 525 (1988).

[46] In *The Garden City No. 2*, [1984] 2 Lloyd's Rep. 37, it was stated, "limitation of liability…is of long standing and generally accepted by the trading nations of the world. It is a right given to promote the general health of trade and in truth is no more than a way of distributing the insurance risk."

[47] Indeed, maritime law, by its origins, sources and nature, is especially adapted to international uniformity, as its component parts are very international. For discussion of uniformity in international maritime law, see generally, William Tetley, *Uniformity of International Private Maritime Law – The Pros, Cons and Alternatives to International Conventions – How to Adopt an International Convention*, 34 Tul. Mar. L. J. 775 (2000); Patrick Griggs, *Limitation of Liability for Maritime Claims: the Search for International Uniformity*, L.M.C.L.Q. 369 (1997).

between different states and commerce between nationals of different states, as well as obtain predictability and certainty of international justice and order.

Nowadays, the majority of the world's shipping tonnage is covered by reference to the 1957 and 1976 Conventions as well as its 1996 Protocol, which will be one of the major topics in this thesis.[48] Nevertheless, there are also other countries that have implemented the 1924 Limitation Convention or purely domestic regimes, e.g. the United States.[49] Furthermore, it is not uncommon that countries often make reservations when accepting the international Conventions; even courts of different countries usually produce their own highly discretional interpretations of the Convention wording. Differences in economic and social standards in the various regions of the world, with different concerns and expectations and political reality, make consensus on an appropriate limitation regime hard to achieve, which induces the claimants or shipowners to engage in "forum-shopping" to seek the system most favorable to them.[50]

To sum up, limitation of liability for maritime claims is an important legal system in maritime law. It is worth mentioning that the limitation of liability as referred to in this thesis is a global limitation, i.e., limitation of shipowner's liability for all claims subject to limitation that arise on a certain occasion, e.g., an accident, or in connection with a certain venture, e.g., a voyage. The global limitation of liability is calculated on the basis of the tonnage or the value of the particular vessel. This is in contrast with the limitation regime per package or unit under the law for carriage of goods by sea which has a quite different foundation (known as package limitation). Package limitation will not be discussed in this thesis.[51]

The thesis will mainly focus on the substantive aspects of global limitation of liability such as vessels and persons entitled to limitation of liability, claims subject to and excluded from limitation of liability, conduct barring limitation and the amount of the limitation fund, as well as the procedural aspects such as limitation proceedings. Besides, as pollution damage has become a more and more severe worldwide problem threatening marine environment in recent years, other special limitation regimes for claims arising out of pollution at sea, such as oil pollution, pollution by hazardous and

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[48] However, some States have adopted a later limitation Convention without denouncing the previous one, in that case, the latest Convention will be applied except, pursuant to Article 30(4) of the 1969 Vienna Convention on the Law of Treaties, the two particular States involved are parties to an earlier Limitation Convention, which would be applied between them.

[49] When a problem of limitation arises in practice it is always essential to consult the national legislation, whether it gives domestic effect to the Convention in the country concerned or not.

[50] See also William Tetley, *The lack of uniformity and the very unfortunate state of maritime law in Canada, the United States, the United Kingdom and France*, L.M.C.L.Q. 340 (1987)

[51] There have been three international conventions which deal with liability for carriage of goods by sea and package limitation, namely, International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (1924 Hague Rules), Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (1968 Hague-Visby Rules), and the United Nations Convention on the Carriage of Goods by Sea 1978 (1978 Hamburg Rules). When a shipowner is held liable for cargo damages, his right to limitation may be subject to both legal regimes. The above-mentioned three Conventions resolved the conflict between these two different limitation regimes by expressly providing that their limitation regimes do not affect the rights and duties under any Convention relating to global limitation of liability. That is to say, should any conflict of laws arise with respect to limitation of liability, the provisions on global limitation of liability shall take precedence over those on package limitation of liability.

noxious substances, as well as bunker pollution will be briefly introduced by reference to the pertinent conventions and national legislations. As such, the thesis is aimed at providing reasonable interpretations of relevant provisions contained in the international convention and domestic regimes (i.e. the limitation regimes of the U.K., China and the U.S.), generalizing some principles from judicial practice, and proposing certain suggestions for further amendment of the law.

Part I

Limitation of Liability for Maritime Claims —Substantive Aspects

Chapter One Vessels Entitled to Limitation

Introduction

For the purpose of discussing limitation of liability in maritime law, it is essential to determine whether a particular maritime structure is a vessel within the limitation of liability regime in the first place, no matter whether the regime is based on a tonnage system or a ship-value system. However, the definition of vessel varies from country to country as far as limitation of liability is concerned. This chapter will firstly take a review of the scope of vessels under the limitation Conventions, and thereafter put emphasis on the discussion of the concept of vessels within limitation regimes of the U.K., China and the U.S. respectively.

1.1 Under the Conventions

Both the 1957 Convention[52] and the 1976 Convention[53] confer the right to limit to a seagoing ship. However, sea-going vessels are not defined in the Conventions.

The 1957 Convention allowed a State Party to decide what "other classes" of ship could be treated in the same manner as sea-going ships for the purposes of the Convention.[54] Furthermore, it provided for a minimum deemed tonnage of 300 tons for purposes of limitation in respect of all types of claim.[55] However, the Protocol of Signature of that Convention reserved to States the right to make specific provisions of national law in relation to ships of less than 300 tons.

Under the 1976 Convention, however, state parties are more restricted in this respect. According to the Convention, they have the option to make specific provisions of national law in relation to the limitation of liability of ships less than 300 tons and vessels intended for navigation on inland waterways.[56] That is, the contracting state may choose to extend the application of the Convention to the above classes of vessels, or regulate them by specific domestic legislations. By virtue of Article 6 of the 1976 Convention there is a minimum limitation fund for all ships not exceeding 500 tons. The 1996 Protocol to the 1976 Limitation Convention has increased the minimum tonnage for limitation purposes from 500 tons to 2,000 tons.[57] However, as stated above, Article 15(2) of the Convention preserves the right of a State Party to make specific domestic regulations in relation to ships of less than 300 tons.

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[52] Article 1(1) of the 1957 Convention provides: The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner.

[53] Article 1(2) of the 1976 Convention provides: the term shipowner shall mean the owner, charterer, manager and operator of a sea-going ship.

[54] See Article 8 of the 1957 Convention.

[55] See Article 3(5) of the 1957 Convention.

[56] See Article 15(2)(a)(b) of the 1976 Convention.

[57] See Article 3 of the 1996 Protocol.

In addition to the above-mentioned options with respect to the applicability of the Convention, there are also some express provisions in the Convention that specify non-applicability of the Convention under certain circumstances. The Convention excludes application to vessels constructed for or adapted to, and engaged in, drilling, if the Contracting States provides in its national legislation for a higher limit than the Convention, or if the Contracting State is a party to an international convention regulating liability and limitation of liability in respect of such vessels.[58] Accordingly, it can be reasonably inferred that if a State Party is neither a party to any international convention governing drilling vessels nor having its own applicable domestic legislation, the 1976 Convention may still be applicable to such drilling vessels. Furthermore, the 1976 Convention also expressly excludes its application to aircushion vehicles and floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof.[59]

Nevertheless, the Convention defines neither "drilling vessel" in Article 15(4) nor "floating platforms" in Article 15(5). In practice, it may cause conflicts in the application and interpretation of these provisions.[60] Drilling vessels, mostly reconstructed from vessels, are normally within the definition of "vessel" in the maritime law considering their structure and self-propelled capability. So there is a possibility that drilling vessels are within the protection of the 1976 Convention as long as there is no other international or domestic applicable law governing drilling vessels. However, floating platforms can be hardly taken as vessels due to their peculiar structure, limited self-propelled capacity and particular functions. Floating platforms are generally intended to be permanently fixed to the ocean floor and engaged in marine operations instead of fulfilling traditional transport functions of vessels. Therefore, it is more appropriate to entirely exclude such structures from the application of the 1976 Limitation Convention.[61]

Domestically, there are numerous decisions concerning whether a particular object is or is not a "ship" in particular cases.

1.2 Under the Domestic Legislations

1.2.1 Under the U.K. Law

Originally, in the United Kingdom, ship was defined by the 1894 Merchant Shipping

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[58] See Article 15(4) of the 1976 Convention.

[59] See Article 15(5) of the 1976 Convention.

[60] For example, Article 15(5) provides that floating platforms for the purpose of off-shore exploring and exploiting shall be outside of the scope of the Convention entirely. Thus, when a drilling vessel is involved in an off-shore exploring and exploiting project, it would hardly be possible to determine which provision of the Convention should be applicable. See Harold K. Watson, *The 1976 IMCO Limitation Convention: A Comparative View*, 15 Houston Law Review 249, 260-261 (1978)

[61] However, this does not mean that floating platforms are completely excluded from limitation of liability. Both the Rio Draft Convention on Offshore Mobile Craft of 1977 and its Amended Sidney Draft of 1994, which in large part apply by reference all or parts of existing international conventions concerning ships to offshore mobile craft, recognize limitation of liability for floating platforms. Some countries such as the U.S. and Canada suggested establishing a comprehensive Convention containing liabilities for both floating platforms and permanent platforms. It was also suggested that limitation fund of floating platforms is calculated by reference to the "maximum operational depth" of the platform rather than the gross tonnage.

Act as including "every description of vessel used in navigation not propelled by oars."[62] Moreover, section 503 of the 1894 Act granted the right to limit to ships whether seagoing or not. So the courts of the UK have since 1894, recognized the right of the shipowner , whether seagoing or not, to limit his liability. The definition of "ship" in the 1894 Act has been extended by a number of subsequent enactments. Currently, limitation of liability is governed by the 1976 Limitation Convention and its 1996 Protocol subject to certain reservations.[63]

The 1995 Merchant Shipping Act (1995 MSA) makes it clear that in the UK the limitation provisions of the 1976 Convention are to be applied in relation to any ship whether seagoing or not and that the word "ship" is rather widely defined for limitation purposes as including "any structure, whether completed or in the course of completion, launched and intended for use in navigation as a ship or part of a ship".[64] Thus, vessels are within the protection of limitation provisions provided that they satisfy the above definition of "ship" contained in the 1995 Act. However, in order to protect shipowners of small vessels, there is a minimum level of limitation for ships of less than 300 tons in respect of all claims in accordance with the right of reservation contained in the 1976 Convention and its 1996 Protocol.[65] Thus, a vessel of 300 tons or less will have a limitation fund calculated on the basis of 300 tons; and since the 1996 Protocol was effective in the U.K., a vessel of 301 tons or more but no more than 2000 tons will have a limitation fund based on the minimum of 2000 tons as provided in the 1996 Protocol.

Drilling vessels seem to be subject to the limitation provisions in the U.K., since there is no applicable international or domestic law governing drilling vessels.

As stated in the previous paragraphs, the 1976 Convention does not apply to "aircushion vehicles". In the case of the UK this exclusion does not apply since it does not appear in the 1995 Merchant Shipping Act and therefore does not have the force of law in the UK by virtue of section 185 of that Act. The Hovercraft (Civil Liability) Order 1986[66] provides that the limitation provisions of the 1976 Convention as incorporated in the 1995 Act shall apply to loss or damage connected with a hovercraft, except that the limitation fund of a hovercraft under Article 6 is calculated by reference to the "maximum operational weight" of the craft rather than the gross tonnage and the limitation provisions in the Convention shall not apply to passenger claims, as such claims and the carrier's right to limit are specifically dealt with by section 3 of the Carriage By Air Act 1961 as modified by Schedule 1 to the

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[62] Merchant Shipping Act, 1894, 57&58 Vict., c.60, § 742.

[63] In the U.K., the 1996 Protocol to amend the 1976 Convention is implemented by the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 2004 (the 2004 Order) and the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (the 1998 Order), which came into force on May 13th 2004. This was done by amending the articles of the 1976 Convention as set out in Part I of Schedule 7 to the Merchant Shipping Act 1995, and also by amending the provisions having effect in connection with the Convention in Part II of that Schedule.

[64] Merchant Shipping Act 1995, para. 12 Sched. 7, Pt. II, S. 185(1)

[65] Merchant Shipping Act 1995, para. 5 Sched. 7, Pt. II, S. 185(1).

[66] This Order came into force in the UK on the same date as the 1976 Limitation Convention (Dec. 1st 1986). Upon the implementation of the 1996 Protocol to the 1976 Convention, the Hovercraft (Convention on Limitation of Liability for Maritime Claims (Amendment)) Order 1998, coming into force on the same date as the 1996 Protocol (May 13th 2004), amended the Hovercraft (Civil Liability) Order 1986 by increasing the limits of liability of owners of hovercraft.

Order itself.[67]

There does not seem to be any specific provision in the 1995 Act referring to floating platforms. Since the exclusion in Article 15(5) does not seem to be effective in the UK, floating platforms are *prima facie* subject to the limitation regime in the UK as long as they satisfy the above definition of "ship" contained in the 1995 Act. Otherwise, liability in respect of such platforms will be unlimited in the U.K.

1.2.2 Under the Chinese Law

According to the China Maritime Code, the general definition of ship applies to the limitation of liability for maritime claims, i.e., ship means seagoing ships and other mobile units at sea, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage.[68]

Seagoing ships generally refer to those ships that are capable of navigating at sea, and registered as such. Ships without capacity to navigate at sea, or registered as inland-river ship, are non-seagoing ships.[69] So vessels used on lakes or rivers or for inland navigation are not within the protection of limitation of liability according to the Maritime Code. Ships must be intended to navigate on the water; therefore, a lightship, water warehouse, floating dock, and fixed drilling platform etc. that are permanently fixed to the seabed or harbor can not be identified as a ship within the Code.[70]

As to mobile units at sea, there is not yet a unanimous interpretation till now.[71] According to the interpretation in the questionnaire on amending the China Maritime Code distributed by the Supreme Court, mobile units means those with self-propelled capacity, including a floating platform,[72] aircushion, and seaplane etc.[73] It seems that floating platforms with certain self-propelled capacity, or those not possessing such capacity, but navigable under tow of tugs, are within the scope of vessels under the Code.[74] Thus, structures like aircushion vehicles, floating platforms and drilling

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[67] See Patrick Griggs & Richard Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p. 5

[68] See Article 3 of the Maritime Code. Ship also includes ship's apparels such as anchor, compass, lifeboats, and rigging etc. Ship's apparels, although not part of the ship, but attached to the ship and specified in the ship's apparel directory as commonly used equipments and necessary for the navigation and operation.

[69] Except for the occurrences relating to collision and salvage, the Maritime Code does not apply to non-seagoing ships. See Article 165 (collision) and Article 172 (salvage) of the Maritime Code.

[70] Si, Yuzhuo, *Maritime Law*, Beijing: Law Press (2003), p. 348

[71] "Offshore Unit" in the 1994 Sidney Draft Convention on Offshore Mobile Craft (Sidney Draft) was defined as any structure of whatever nature when not permanently fixed into the sea bed which is capable of moving or being moved while floating in or on water, whether or not attached to the sea bed during operations, and is used or intended for use in exploration, exploitation, processing or storage of hydrocarbons and mineral resources of the seabed or its subsoil and corresponding assistance operations.

[72] Submersible drilling platforms, jack-up drilling platforms and semi-submersible drilling platforms are developed from drilling vessels, but they are distinctly different from drilling vessels both in the structure and self-propelled capacity.

[73] Seaplane has dual functions. When it moves on the sea, it can be considered as vessel, but when it leaves the sea, it is not a vessel any more.

[74] As to status of floating platforms, although there are different viewpoints among academic circles in China, the prevailing one suggests mobile units include drilling platforms in navigation, so a platform

vessels are possibly within the protection of limitation of liability in the Code. The 1976 Convention is more restricted in this respect.

Furthermore, vessels used for military or public service purposes are excluded from the definition of vessel.[75] The criteria are the purpose of the business in which the particular vessel involved is engaged. In other words, the excluded vessels are those with the purpose to engage in military activities or public services, no matter whether owned by the military or the government or not. For example, a commercial vessel which has been taken over and engages in military activities, such as acting as military supply vessel or soldier transport vessel during wartime would be excluded from limitation of liability. Whereas if military or public service vessels[76] are engaged in commercial activities, for instance, their tugs conduct towage or salvage operations at sea with the intent to obtain rewards, they are subject to the limitation provisions.

There is a deemed minimum tonnage of 300 gross tons for the purpose of limitation of liability.[77] According to the Maritime Code, limits of liability in respect of vessels not exceeding 300 gross tons but no less than 20 gross tons, as well as vessels engaged in coastal transportation between domestic ports and vessels engaged in coastal operations[78] shall be drafted by the authority concerned (i.e. Ministry of Transport) subject to the approval of the State Council. However, these particular vessels are still governed by other limitation provisions of the Code.[79] Accordingly in 1993, the Ministry of Transport promulgated the Regulations on Limitation of Liability for Vessels of Less Than 300 Tons and Vessels Engaging in Coastal Transportation as well as Those for Coastal Operations.[80] The limits of liability are significantly reduced compared with those provided by the Maritime Code as applied to seagoing vessels engaging in international transportation.

Currently, the Maritime Code is under discussion for amendment. To eliminate a different treatment of inland river ships, it is submitted to extend the scope of vessel to include vessels and mobile units used on inland navigable waters, as well as vessels of less than 20 gross tonnage. This would greatly broaden the scope of vessels subject to limitation under the Code and have a tremendous impact on the global limitation regime, since in China there is considerable water-borne traffic operating on rivers and canals.

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potentially capable of navigation is a vessel when navigating as well as a working platform when drilling in a permanent location. See Si, Yuzhuo, *Research on International Maritime Legislations and China Countermeasures*, Beijing: Law Press (2002), p. 496-500.

[75] Similarly, the provisions of the Australian Limitation of Liability for Maritime Claims Act 1989 which gives the force of law to the 1976 Limitation Convention also applies only to seagoing vessels; and ships belonging to the navy, military or air force of another country are not afforded protection by the limitation provisions.

[76] Public service vessels include those engaged in governmental official activities, such as coast guard vessels, patrol boats, vessels in the service for harbour authority and quarantine station etc..

[77] See Article 210 of the Maritime Code.

[78] The term "vessels engaged in coastal operations" seems broad enough to include both "drilling vessels" and "floating platforms" as referred to in the 1976 Convention.

[79] See Article 210(5), para.2 of the China Maritime Code.

[80] The regulations entered into force as of Jan.1st, 1994.

1.2.3 Under the U.S. Law

To determine the scope of vessels within protection of limitation provisions under the U.S. law is a more complicated issue, since the U.S. Limitation of Liability Act has been amended several times since 1851.

The general statutory definition of vessel could be of much help in understanding the meaning of vessels. This definition, which defines vessels as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water",[81] applies to all relevant applications of the U.S. Code, except where specific provisions state otherwise. Indeed, even where Congress has individually used the term in certain acts, it has in larger measure adopted the language of the general definition.

In addition to the above general definition and interpretation, the Limitation Act provides its own reference point. The Limitation of Liability Act of 1851 originally excluded the application of limitation of liability to "any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation". As from the 1886 Amendment, the limitation provisions were extended to apply to "all seagoing vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges and lighters".[82] The result of combining the general definition and the definition of vessel in the specific act is that most structures designated as vessels under general maritime law might well qualify as vessels for purposes of limiting liability.[83]

Despite wide latitude of the statutory language, courts have typically been more restrained in classifying structures as vessels for purposes of limitation of liability and inclined to take the traditional meaning of vessels, that is, a craft traditionally has to be connected with navigation or commerce on navigable waters. For example, in *Complaint of Three Boys Houseboat Vacations U.S.A. Ltd.*,[84] it was held that the Limitation Act applies only to casualties occurring on waters considered "navigable" for purposes of admiralty jurisdiction.[85] Similarly, in *In re Harry Dickenson*[86], the court held it lacked jurisdiction over a shipowner's claim for limitation of liability where the incident giving rise to the limitation complaint took place on a vessel drydocked fifty feet from navigable waters of the United States.[87]

The question whether a given structure is a vessel often depends on the purpose for which the structure was constructed and the business in which it was engaged. The

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[81] 1 U.S.C. 3.

[82] 46 U.S.C. 188.

[83] See generally, James Herzberg, *Application of the Limitation of Liability Act to Special Purpose Craft*, 16 J. Mar. L. & Com. 483 (1985)

[84] 878 F.2d 1096, 921 F.2d 775 (9th Cir. 1990).

[85] The Supreme Court made a definitive analysis of the basis for the district court's admiralty and maritime jurisdiction in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253-54, 1973 AMC 1, 4-5 (1972).

[86] 780 F. Supp. 974, 975-76, 1992 AMC 1660, 1662-63 (E.D.N.Y. 1992).

[87] See also, *David Wright Charter Service v. Wright*, 925 F.2d 783, 1991 AMC 2927 (4th Cir. 1991), where the court affirmed the dismissal of a limitation complaint by an owner whose vessel was seventy-five feet from navigable waters in a dry dock at the time that the casualty giving rise to the limitation proceeding occurred.

mere fact that the structure floats on navigable waters is not determinative of its status as a vessel. For example, In *Matter of Sedco, Inc.,*[88] it was held that the intended use of the craft in navigation and as a means of transportation alone would not suffice to make it a vessel, rather, the craft must be subject to the perils of the sea and not permanently attached to the shore or seabed.[89] To be within the protection of limitation, the craft should be capable of being used as a means of transportation on water. Thus, in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*[90], the court found that the wharfboat was not a "vessel" within the meaning of limitation of liability statute at the time it sank, since it was an aid to river traffic, it was not used to carry freight from one place to another, it was not practically capable of being used as a means of transportation, so encountered no perils of navigation. Whether the wharfboat had the potential capability of being used as a means of transportation did not really matter. What was significant was whether at the time of the incident, the wharfboat was functioning as a means of transportation.[91]

As to special purpose craft, fixed platform facilities are generally not within the protection of limitation of liability. However, according to American case law, an air vehicle, when floating on the water, has in some cases been held to be a "vessel" for admiralty purposes. And movable offshore drilling barges, such as semi-submersibles, submersibles, or jack-up drilling barges, are "vessels" as long as they are within the definition of vessel, i.e., not merely working platforms but also capable of being used as a means of transporting persons, cargo or equipment on navigable water. Thus, the owners of these vessels can invoke the Act's protection when a casualty occurs aboard them.[92]

The U.S. court recognized the dual functions of floating platforms, for example, in *Dresser Industries, Inc. v. Fidelity & Cas. Co.*[93] although the court held that a jack-up drilling rig with its legs resting on the floor of the ocean was not a vessel due to its permanent location, however, if its legs were lifted and launched into the course of

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[88] 543 F.Supp.561, 1982 AMC 1461 (S.D. Tex. 1982).

[89] Also in *Texas Co. v. Savoie*, 240 F.2d 674 (5th Cir.), cert. denied, 355 U.S. 840 (1957), the deceased was blown off a "well platform," and it was held that the deceased was employed to work on platforms, not on a vessel, since the platform was firmly embedded in the bottom of the Gulf of Mexico.

[90] 271 U.S. 19 (1926).

[91] Similarly in *In re U.S. Air Force Texas Tower No.4*, 203 F.Supp.215 (S.D.N.Y.1962), the court held that according to the tower's location and function it was not a vessel, since the structure was not intended to be nor actually used as a means of transportation, nor that it be used for the purpose of navigation or to carry freight from one place to another. Its intended permanence of location was obvious, although the tower was subject to the perils of the sea, it was not subject to the perils of navigation. Also, the court held that the fact that the tower may be regarded as a vessel under other statute does not necessarily make it a vessel under the Limitation of Liability Act.

92 e.g., in *In re Great Lake Dredge & Dock Co.*, 250 F.916 (D.C. Mass., 1917), aff'd, 256 F.497, 168 C.C.A. 3 (C.C.A. 1(Mass.), 1919), a drilling boat, which was firmly held to the bottom of the waterway by metal "spuds" while drilling, was held to be a vessel. In *Matter of Sedco, Inc.*, 543 F. Supp. 561, 1982 AMC 1461 (S.D. Tex. 1982), a semi-submersible drilling rig was held to be a vessel for purposes of limitation of liability. Also in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 348 (5th Cir. 1998), since the rig involved was found to be assembled for the purpose of transporting the workover rig across navigable waters to plug and abandon wells located in various sites on navigable waters, the court held that it was "vessel" within the meaning of the Jones Act. "Despite the outward appearance of the structure at issue, if a primary purpose of the craft is to transport passengers, cargo, or equipment from place to place across navigable waters, then that structure is a vessel. Its mobility was essential to the work it was designed and built to perform."

[93] 580 F.2d 806, 1978 AMC 2588 (5th Cir. 1978).

navigating, it could be regarded as a vessel. Therefore, an oil rig potentially capable of navigating is a vessel when navigating and a working platform when drilling.[94]

Seagoing Vessels—Supplemental Funds

To determine whether a particular vessel is seagoing or not has become highly indispensable with the introduction of the amendment to the Limitation Act in 1935 on supplemental funds for personal injury and death claims,[95] since the prerequisite to apply the supplemental funds is that the vessel involved is seagoing.[96]

In essence, section 183(b) dictates that where a vessel is classified as a "seagoing" vessel, if the fund is insufficient to pay claims for personal injury or death, the court may increase the fund to $420 per ton of the seagoing vessel's tonnage to benefit personal injury and death claimants.[97]

The term "seagoing" vessel is not easily defined. Section 183(f) defines the term in a negative way for purposes of section 183(b)'s per-ton limitation fund by providing a "laundry list".[98] The correct interpretation of this section is not free from doubt. However, according to the legislative intent and established judicial practice, the laundry list, with the exception of pleasure yachts, is generally limited to harbor and river vessels.[99] For example, "tank vessels" was meant to apply only to river and harbor tank vessels.[100] Thus, the geographic range of the vessel is important in determining whether she was seagoing or not for the purpose of increasing the limitation fund. Any vessel which is engaged in foreign, coastwise or intercoastal commerce is a seagoing vessel, no matter where she may be located or berthed at any particular time, or in what limited harbor or river traffic she may be engaged on specific occasions. A vessel is seagoing if she regularly sails beyond the harbor, river or other inland waters.[101]

In the recent years, the courts have been more and more inclined to adopt the function of the vessel as the test to determine whether the vessel is seagoing. For example, in

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[94] However, question may arise as to how to demarcate different stages of navigation and working as platform for purposes of determining whether the object is a vessel or not.

[95] At the time the amendment was being considered, 183(b) provided that the limitation fund could be increased only to $60 per ton of the vessel's tonnage as opposed to the current $420 per ton.

[96] See 46 U.S.C. 183(b)

[97] For discussion on limitation fund, see Chapter 6 on Limits of Liability.

[98] 46 U.S.C. 183(f) provides: "As used in subsection (b), (c), (d) and (e) of this section and in section 183(b) of this Appendix, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term used in section 188 of this title."

[99] In *Petition of The Dodge, Inc.*, 282 F.2d 86, 89-90, 1961 AMC 233 (2d Cir. 1960), the court stated: ...We think that ambiguous language in statutory provisions relating to limitation of liability should be resolved in favour of interpretations increasing the instances where full recoveries from the limiting vessel are possible. See Jill A. Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Tul. Mar. L.J. 659, 669-670 (2000)

[100] E.g., in both *Petition of Panama Transport Co.*, 73 F.Supp.716, 1947 AMC 651 (S.D.N.Y. 1947) and *Petition of The Dodge, Inc.*, *supra* note 47, the court affirmed an increase of limitation fund since the particular vessel involved was found not a tanker of the river or harbour type but a seagoing vessel.

[101] See *Petition of Bogan (The Paramount III)*, 103 F.Supp. 755 (D.N.J. 1952).

Matter of Talbott Big Foot, Inc.,[102] it was held, to determine whether a vessel is seagoing or not is to see whether the vessel does, or is intended to, navigate in the seas beyond the Boundary Line[103] in the regular course of its operations. The Court must examine the design, function, purpose, and capabilities of the vessel in order to determine whether it will be normally expected to engage in substantial operations beyond the nautical boundary.[104] So the court, while discarding the "actual use" test[105] and "capability" test,[106] chose the "intended or normally expected use" test.[107] Thus, under the *Talbott* definition, a river-bound ocean liner would qualify as a seagoing vessel and thereby be subject to a section 183(b) increase of limitation fund.

Given the test in *Talbott Big Foot,* lash barges[108] would likely be designated as nonseagoing vessels and thereby not subject to the section 183(b) minimum per-ton limitation. Despite such barges spend a substantial portion of their time beyond the Boundary Line, they are typically not involved in navigation beyond the Boundary Line, given the fact that the lighters are stowed aboard seagoing vessels, performing the function equivalent to the ship's cargo hold during such periods, and normally engage in navigation only within inland waters inaccessible to the mother vessel.[109].

Issue of Pleasure Boats

One exception to the general restrictive interpretation of the Limitation Act in the United States is allowing limitation of liability in cases involving pleasure boat accidents on navigable waters.[110]

However, this has gone a long way in the legislative history. Originally, the 1851 Limitation Act did not apply to vessels used in rivers or inland navigation, including canal boat, barge and lighter etc., as was inferred that pleasure boats were excluded

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[102] 854 F.2d 758, 1989 AMC 1004 (5th Cir. 1988). In this case, the injured crewmen brought claims and sought to increase limitation fund, so the issue was whether *Big Foot Two* was a "seagoing vessel" within the Limitation Act. The court stated that it is … the usual operation to be expected, for a vessel of its design that defines whether a particular vessel is seagoing in the meaning of this statute. That is, it is the function of the particular vessel that determines its status.

[103] Boundary Line is the line which divides the high seas from rivers, harbours, and inland waters.

[104] According to 33 U.S.C. 151(b), the Secretary of the department in which the Coast Guard is operating shall establish appropriate identifiable demarcation lines (Boundary Line) dividing rivers, harbours and inland waters of the United States from the high seas for the purpose of determining the applicability of different statutes.

[105] Under the "actual use" test (vessel actually or regularly used on the ocean), an ocean liner used on inland waters for entertainment purposes would be incorrectly characterized as a non-seagoing vessel.

[106] Under the "capability" test (vessel's capability of being used on the ocean), a harbour or river vessel may be defined as seagoing when it merely has the potential to navigate on the sea, this would shrink the calculation of limitation fund based on ship's value in section 183(a) nearly out of existence.

[107] Actually, this more expansive test significantly limits section 183(a), which suggests a possible bias by the court against the Limitation Act. See generally, David R. Kunz, *The 'Function of The Vessel' – A New Definition of "Seagoing" Under The Limitation of Liability Act: Matter of Talbott Big Foot, Inc.*, 14 Tul. Mar. L.J. 187 (1989)

[108] The typical lash operation involves loading of multiple dumb barges at harbours of sufficient depth to accommodate deep-draft mother lash vessels (the barges being necessary to transit shallower waterways beyond the reach of such ships).

[109] See Robert S. Crowder, *Is a LASH Lighter a Vessel for Purposes of Shipowner Limitation of Liability?*, 22 Tul. Mar. L.J. 255, 261-266 (1997)

[110] Where a maritime accident occurs on non-navigable water, the court does not have admiralty jurisdiction over the complaint for limitation of liability. See *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115, 1993 AMC 605 (5th Cir. 1992).

from the limitation protection, since they were normally engaged in purely local navigation.[111] Later in the 1886 Amendment, the application of Limitation Act was expressly extended to vessels used on lakes or rivers or inland navigation.[112] Despite what was the precise Congressional intent in enacting the 1886 Amendment, it has resulted in many judicial interpretations in favour of extending limitation to non-commercial pleasure boats.[113] .

In any case, the congressional intent manifested itself further in later amendments to the Act culminating in 1936.[114] The supplemental fund established by the 1936 amendment applies only to seagoing vessels, which are defined as excluding pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels etc.[115] Thus, having specifically excluded "pleasure yachts" from the supplemental fund requirement, Congress has evidenced its clear intent in having such craft remain included within the scope of the limitation protection. This is a very persuasive argument, and has been acknowledged as such in numerous court decisions.[116]

Following the 1936 Amendment, it is generally agreed among federal judges that pleasure boat owners are entitled to protection under the Limitation Act.[117] Today, limitation of liability will be available to owners of yachts and other non-commercial pleasure craft navigating upon navigable waters within the admiralty jurisdiction of the United States.[118] For example, in *Sisson v. Ruby*,[119] the United States Supreme Court held that nothing in the United States Limitation of liability Act permits the Act's benefits to be denied to pleasure boat owners even if their activities did not directly involve maritime commerce.[120]

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[111] The first relevant case is *The Mamie,* 5 F. 813 (E.D. Mich. 1881).

[112] Act of June 19, 1886, ch. 421, sec. 4, 24 Stat. 80 (codified as amended at 46 U.S.C. 188).

[113] However, some author argued that the 1886 Amendment should not have changed the types of vessels (i.e., commercial) that could seek protection under the Limitation Act. Thus subsequent judicial interpretation of the 1886 Amendment that pleasure boats were afforded protection under the Limitation Act was based on the wrong foundation. See Timothy J. Saviano, *Pleasure Boats and the Limitation of Liability Act*, 24 J. Mar. L. & Com. 519 (1993)

[114] Act of June 5, 1936, ch.521, se. 1, 49 Stat. 1479 (codified as amended at 46 U.S.C. 183).

[115] 46 U.S.C. 183(f).

[116] See, e.g., *In Re Klarman*, 295 F.Supp.1021, 1969 AMC 1446 (D.Conn. 1968); *In Re H.T. Porter*, 272 F.Supp.282 (S.D.Tex.1967); *In Matter of Michael Roberto and Vincent Roberto*, 1987 AMC 982 (D.N.J. 1986). See generally, Lewis Herman, *Limitation of Liability for Pleasure Craft*, 14 J. Mar. L. & Com. 417 (1983); Michael B. McCauley, *Limitation of Liability and Recreational Vessels*, 16 Tul. Mar. L.J. 289, 292 (1992)

[117] See, for example, *Petition of Liebler*, 19 F.Supp. 829, 1937 AMC 1006 (W.D.N.Y. 1937); *The Inga*, 33 F.Supp. 122, 1940 AMC 965 (S.D.N.Y.1940); *In re Hutchinson (The Spare Time II)*, 36 F.Supp. 642, 1941 AMC 417 (E.D.N.Y. 1941); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1990 AMC 609 (11th Cir. 1990); *In re Guglielmo*, 897 F.2d 58, 1990 AMC 1991 (2d Cir. 1990). *Keller v. Jennette,* 940 F.Supp. 35 (D.Mass. 1996), *Moeller v. Mulvey*, 959 F.Supp. 1102 (D.Minn. 1996).

[118] There are compelling arguments in favor of continued extension of limitation of liability to pleasure boats. The pleasure craft industry contributes in some ways to commercial maritime activity, moreover, pleasure boat owners will continue to be exposed to much the same risks in operating their vessels as those larger commercial vessels. Excluding of pleasure boats from protection of limitation will also affect uniform application of the law.

[119] 497 U.S. 358, 1990 AMC 1801 (1990).

[120] Likewise, in a later Canadian case *Whitbread v. Walley* [1990] 3 S.C.R. 1273, the Supreme Court of Canada held, the Act does not restrict the application of the limitation of liability provisions to commercial craft, as a matter of construction, pleasure boats fell within the definition of a ship. Where the Act intended to exempt pleasure craft, it did so expressly. See Daniele Dion, *The Canadian Approach to Limiting the Liability of Pleasure Craft Owners*, 24 J. Mar. L & Com. 561 (1993).

There are always dissatisfactions with extending limitation of liability to pleasure boats as the U.S. courts usually take a hostile attitude towards limitation of liability.[121] Nevertheless, any restriction of the application of the Act would require congressional action. Therefore according to the legislative intent and case law, pleasure boats will continue to remain within the limitation protection.

Conclusion

It is not easy to define a ship for the purposes of limitation of liability. Indeed, it is mostly decided by domestic laws and the facts in each particular case. In determining whether a given structure is a ship, all the relevant elements such as the design of the particular structure, the purposes for which it is capable of being used, and the business in which it has been engaged have to be taken into consideration comprehensively. The Conventions do not give any specific definition of ship in the limitation context, but only allow the state parties some options with respect to the applicability and non-applicability of the Convention for certain type of ships or structures under certain circumstances. Drilling vessels are very likely taken as ships, whereas it could be hard to recognize floating platforms as such. Those intermediate types of structures that float, propel and navigate themselves could possibly be regarded as ships for statutory purposes as well.

Under the U.K. law, limitation of liability is widely applied to any ship whether seagoing or not and the word "ship" is rather widely defined for limitation purposes. While under the Chinese law, there are more restrictions on the definition of ships either in the general statutory language or in the particular limitation context. According to the China Maritime Code, the word "ship" is confined to seagoing ships and other mobile units at sea, but does not include ships used for military or public service purposes, nor small ships of less than 20 tons gross tonnage. It is to be hoped that this restrictive scope of ships be extended to include ships used on inland navigable waters as well as ships of less than 20 gross tonnage when the Maritime Code is amended.

Under the U.S. law, the Limitation Act has brought a wide range of ships within the protection of limitation provisions. However, courts have generally adopted a restrictive interpretation in defining the ship for purposes of limitation of liability. It is important in determining a ship's seagoing status because of the provision of a supplemental fund for personal injury or death claims under the Limitation Act. According to the legislative intent and established judicial practice, non-seagoing ships are generally limited to harbor and river ships.

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[121] For example, in *Richards v. Blake Builders Supply, Inc.*, 528, F.2d 745 (4th Cir. 1975), the court, although approving limitation petition by the boat owner, stated that "...Limitation...in the context of a small pleasure craft capable of causing death or grievous injury is in conflict with our senses of justice and appropriateness...We can perceive no reason to extend that protection to the relatively affluent owners of pleasure boats and their insurers at the expense of those injured or killed and their families."

Chapter Two Persons Entitled to Limitation

Introduction

In the evolution of the limitation regime for maritime claims, originally, only the shipowners were entitled to limit their liability, as it was traditionally called "shipowners' limitation of liability". With the time going on and the development of shipping industry, the categories of people that are protected by this regime have been extended to other persons significantly, such as charterers, salvors, their employees and agents, as well as liability insurers. Certainly various countries may make different provisions in respect of persons entitled to limit liability. Therefore, it is always necessary to check national legislations to determine what types of persons enjoy this limitation privilege and thereby have the standing to invoke the limitation of liability.

Within the domain of international conventions, under the 1924 Limitation Convention, only shipowners were entitled to limitation of liability. Later on, with the development of shipping industry, and also to overcome attempts by a claimant to circumvent the effect of limitation of liability by claiming against persons other than the shipowner, e.g., master and crew of the vessel, the 1957 Limitation Convention extended the class of persons entitled to limit liability "to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment in the same way as they apply to an owner himself."[122] While under the 1976/1996 Convention, to encourage the salvage industry, the right to limit liability is further extended to the salvor. Furthermore, in consideration of the impact of insurance industry on limitation of liability, the liability insurer is also included within the protection of the limitation.[123]

Under the U.K. law, originally, only the shipowners that caused the loss or damage were protected by the limitation of liability according to the 1894 Merchant Shipping Act.[124] This limitation privilege was later extended and developed by subsequent statutes. By reference to the 1957 Limitation Convention, the privilege was extended by the 1958 Merchant Shipping Act to the charterer, whether by demise or otherwise; any person interested in or in possession of a ship, and in particular, any manager or operator of a ship,[125] the master and any member of the crew.[126] The right to

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[122] See Article 6 of the 1957 Convention

[123] Article 1 of the 1976 Convention provides that limitation of liability is available to the owner, charterer, manager and operator of a seagoing ship, salvor, any person for whose act, negligence or default they are responsible, and liability insurer.

[124] In judicial practice, it had long been held that equitable or unregistered owners were also included in the definition of "owner". See *The Hopper No. 66*, (1908) A.C. 127, "owner" was construed as being inclusive of a demise charterer.

[125] This appeared to be broad enough to cover a shipbuilder or ship repairer under relevant circumstances since they may be interested in or in possession of a ship and possibly will fall under the category of "manager" or "operator". See Michael Thomas, *British Concepts of Limitation of Liability*,

limitation was further granted to wider groups of persons including salvors and liability insurers according to the 1995 Merchant Shipping Act that adopted exactly the same wording as that of the 1976 Convention.

In China, prior to the enactment of the Maritime Code, limitation of liability was governed by Certain Regulations on Compensation for Maritime Accidents of 1959 and various relevant administrative rules in which shipowners were the only parties protected by the limitation provisions.[127] Currently, China has adopted in the Maritime Code almost the same wording of the 1976 Limitation Convention in respect of the persons entitled to limit, i.e. shipowners, operators, charterers, salvors, any person for whose act, negligence or default they are responsible, and liability insurers, with some difference which will be discussed below.[128]

While in the U.S., as a general rule, only owners or bareboat (demise) charterers (in which the charterers take on the role of owners *pro hac vice* of a vessel) are parties allowed to enjoy the right of limitation according to Sections 183 and 186 of the 1851 Limitation Act. Evidently, both the 1957 and 1976 Limitation Conventions have a much greater coverage of persons entitled to limit than the U.S. law allows.

Simply put, to invoke the limitation of liability, the person who intends to enjoy the right of limitation must bring himself within the scope of the relevant limitation provisions. This Chapter will discuss the right to limitation of various parties that are involved in the maritime industry under the U.K., Chinese and the U.S. limitation regimes.

2.1 Shipowner

2.1.1 Owner

Neither the 1957 nor the 1976 Limitation Convention gives any clear definition of the term "owner" or "shipowner". The 1976 Convention provides that shipowner shall mean the owner, charterer, manager and operator of a sea-going ship.[129] The 1957 Convention provides that it shall apply to the owner, charterer, manager and operator of the ship.[130] Neither the 1995 Merchant Shipping Act of the U.K. (adopted the 1976 Convention) nor the China Maritime Code (modeled on the 1976 Convention) provides any more definitive description of shipowner for purposes of limitation of liability except that the former statute defines "shipowner" as including charterer, manager and operator of the ship and the latter statute defines the same as including charterer and operator of the ship.[131]

As the persons entitled to limit under the international convention regime have been

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53 Tul. L. Rev. 1205, 1209 (1979); Patrick Griggs & Richard Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p.8-9.

[126] See Section 3(1) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 which amended the 1894 Merchant Shipping Act and reflected the provisions of the 1957 Convention.

[127] See Si Yuzhuo, *Maritime Law*, Beijing: Law Press, 2003, at p.6-7.

[128] See Articles 204, 205 and 206 of the Maritime Code.

[129] See Article 1(2) of the 1976 Convention.

[130] See Article 6(2) of the 1957 Convention.

[131] It is obvious that the China Maritime Code intended a broader scope for the term "owner" in limitation of liability than that generally used under the Code (i.e. registered shipowner).

largely extended to include all kinds of charterers, managers or operators of a vessel, it is actually unnecessary for a person to fight to seek owner's status in order to be entitled to limitation of liability. However, the shipowner's status is still highly important in the U.S. since only owners or demise charterers are entitled to limitation of liability according to its statutory provisions.

The term "owner" is not specifically delineated by the U.S. Limitation Act. Indeed the courts have defined it with a broad common-sense meaning. For example, the Supreme Court has stated that "owner", for purposes of section 183, is a non-technical word that should be given broad construction.[132] In *Petition of Colonial Trust Co.*,[133] the court held that the word "owner" must be construed in its ordinary, popular sense to fulfill the intent and purpose of the statute, and thereby extended limitation of liability to both the holder of legal title and holder of beneficial title, as the former registered the vessel, while the latter exercised control and custody and maintained the vessel. Similarly, in *Magnolia Marine Transport Co. v. Oklahoma*,[134] it was held that the corporate parent of the vessel owner could qualify as an owner entitled to limited liability under the Limitation Act.

It is generally recognized that the time of the accident determined "ownership". Thus, a former owner of a vessel was allowed to maintain a petition to limit liability where the negligent conduct or accident occurred during its period of ownership.[135] Owners are not limited to those with legal title of ownership and have been held to "embrace persons whose degree of possessory, managerial and operational control, and relationship to the titleholder of the vessel justifies the inference of their being owners".[136] Thus, the owner status under section 183 is available to any person or entity who may be held liable to another because of ownership or control of the vessel.[137]

Courts have held that ownership status extends to shareholders of corporate owners,[138] underwriters that accepted abandonment of a stranded vessel as a total loss,[139] and a managing agent who contractually possesses virtually all of the responsibilities of a shipowner for vessel operation when petitioning as co-plaintiff with the registered owner.[140] The term "owner" has also been held to include the individual responsible for the vessel's maintenance and operation where that person is the president and sole shareholder of the company owning the vessel.[141]

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[132] See *Coryell v. Phipps*, 317 U.S. 406, 411, 1943 AMC 18, 22 (1943). *Dick v. United States*, 671 F.2d 724, 727 (2d Cir. 1982)

[133] 124 F.Supp.73, 1955 AMC 1290 (D.Conn. 1954).

[134] 366 F.3d 1153, 2004 AMC 1249

[135] See, e.g., *In re The Trojan,* 167 F. Supp. 576 (N.D. Cal: 1958); *In re Highlands Navig. Corp.*, 29 F.2d 37 (2d Cir. 1928); *In re Sheen*, 709 F. Supp. 1123, 1989 AMC 1345 (S.D.Fla. 1989).

[136] *In re Complaint of Amoco Transp. Co.,* 1979 AMC 1017, 1021 (N.D. III. 1979).

[137] See, e.g., *In re Shell Oil Co.*, 780 F. Supp. 1086, 1089-90, 1992 AMC 2062, 2067 (E.D.La. 1991), where the court stated that the "owner" under the Limitation Act is one subjected, or potentially subjected, to shipowner's liability based on his relationship to the vessel.

[138] See *Flink v. Paladini,* 279 U.S. 59, 62-63 (1929); *In re Shell Oil Co*., 780 F. Supp. at 1089-90.

[139] *Craig v. Continental Ins. Co.,* 141 U.S. 638, 645 (1891)

[140] See *Chesapeake Shipping, Inc. v. Gleneagle Ship Management, Inc. (Chesapeake II)*, 803 F. Supp. 872, 1993 AMC 691 (S.D.N.Y. 1992).

[141] See *In re Lady Jane, Inc.*, 818 F. Supp. 1470, 1474, 1993 AMC 490, 495 (M.D.Fla. 1992). The Government, as well as its various bureaus or commissions, may under certain circumstances be a shipowner entitled to limit its liability. See, e.g., *Austerberry v. United States,* 169 F.2d 583, 593 (6th

However, the relatively broad concept of "owner" is not without qualifications. The person seeking owner's status must exercise dominion over a vessel.[142] For example, in *In re Oil Spill,*[143] the court found that only the registered owner of the *Amoco Cadiz*, a tanker involved in an infamous oil spill off the coast of France, could claim protection under section 183 of the Limitation Act. Limitation claims of two other Amoco entities were rejected because the ultimate authority for operation and maintenance of the vessel had remained only with the registered owner.

In *In re McDonough Marine Servs.,*[144] the vessel's builder Dravo's attempt to limit its liability to the value of the limitation fund was rejected by the court as Dravo was not a section 183 "owner".[145] Also in *Marine Recreational Opportunities v. Berman,*[146], it was held that a former vessel owner was not an "owner" of a vessel within the meaning of the limitation statute. To give the "owner" a broad interpretation, the party seeking to limit liability shall have legal title or be capable of exercising some measures of dominion or control over the vessel at the time of the accident.

For the manufacturer/seller of a vessel, his "ownership" status would disappear upon parting with possession and control of the vessel, notwithstanding that some incident of ownership might be retained, such as mortgage. Thus in *American Car & Foundry Co. v. Brassert,*[147] it was held that the manufacturer of a vessel may not invoke limitation of liability because he had no control over the operation of the vessel whatsoever and was not responsible for any acts of the master and crew members on board the vessel at the time of the accident even though he was the seller of the vessel and still retained legal title to the vessel for purpose of securing the purchase price of the vessel.[148]

State Immunity

The rule of state immunity concerns the protection which a state is given from being sued in the courts of other states. This rule developed at a time when it was thought to be an infringement of a state's sovereignty to bring proceedings against it or its officials in a foreign country. It should be mentioned here that in 1926 the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships was adopted. This Convention is a successful attempt at international unification in the field of State immunity in practice.[149] The objective

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Cir. 1948); *Hudson Trading Co. v. United States,* 28 F.2d 744, 747 (3d Cir. 1928); *The Snug Harbor,* 53 F.2d 407 (E.D.N.Y. 1931).

[142] See *Dick v. United States*, 671 F.2d 724 (2d Cir. 1982)

[143] 954 F.2d 1279, 1992 AMC 913 (7th Cir. 1992)

[144] 749 F. Supp. 128, 130-31, 1991 AMC 319, 322-23 (E.D.La. 1990)

[145] Similarly in *Complaint of Chesapeake Shipping, Inc.*, 778 F.Supp. 153 (S.D.N.Y 1991), the contractor retained by the shipowner was held not to be an "owner" since he merely manned the vessel.

[146] Lloyd's Maritime Law Newsletter 0373 [1994]

[147] 61 F.2d 162, 1932 AMC 1524 (7th Cir. 1932), 289 U.S. 261 (1933).

[148] Moreover, since the claimant was suing the manufacturer/seller for its negligence as a builder in designing and constructing a product which proved defective, it was held that manufacture of vessels was not a maritime activity intended to be protected by the limitation of liability regime.

[149] This Convention entered into force on 8 January 1937. An additional Protocol was adopted on 24 May 1934. The U.K. signed the Convention; however, it has never ratified it or adopted its provisions into her legal system by statutory enactment. China and the U.S are not the contracting states to this Convention. There are other Conventions dealing with state immunity, i.e, the United Nations

of the Convention was to provide that ships owned or operated by States were to be subjected to the same rules of liability as privately owned vessels. However, ships of war, State-owned yachts and various other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service, were to be excepted.

Now there are substantial exceptions to the rule of state immunity. In particular, a state can be sued when the dispute arises from a commercial transaction entered into by a state or some other non-sovereign activity of a state.[150] The criterion is whether at the time when the cause of action arose, the ship was either being used or intended to be used for commercial purposes. Immunity should not be granted where a vessel was not destined for public use. As the rationale of sovereign immunity had gradually changed over the years with governments and government departments becoming more and more engaged in commercial activities, the immunity is restricted. This would be more in keeping with the purely commercial activities of governments and would enable courts to restrict their recognition of immunity to acts purely of a governmental nature. In general, most countries around the world and international instruments now adhere to the restrictive approach of state immunity.

As discussed above, under both Limitation Conventions, operators, managers and charterers are within the same protection of limitation of liability as shipowners. However, the definition and scope of operators, managers and charterers are not specified in the Conventions; therefore, to a large extent, they are subject to domestic interpretations.[151]

2.1.2 Operator

It is hard to give a precise definition of operators. According to the United Nations Convention on Conditions for Registration of Ships of 1986, "operator" was defined

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Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 December 2004, not yet in force), the European Convention on State Immunity 1972 (enter into force on 11 June 1976).

[150] As Lord Denning stated in *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379, "sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Is it properly cognisable by our courts or not? If the dispute brings into question, for instance, the legislative or international transaction of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so; but if the dispute concerns, for instance, the commercial transaction of a foreign government (whether carried out by its own department or agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity." See also *Petrol Shipping Corporation v. The Kingdom of Greece, Ministry of Commerce, Purchase Directorate* [1966] 2 Lloyd's Rep. 431, where it was held that the Purchase Directorate of the Greek Ministry was at the material time engaged in commercial dealings and therefore not granted the immunity.

[151] When looking back to the legislative history of the 1976 Convention, according to the 1972 CMI Documentation 14, the Working Group of the International Subcommittee of the CMI had originally proposed to extend limitation to "any person rendering service in direct connection with the navigation, management, or the loading, stowing or discharging of the ship", in addition to the owner, charterer, manager and operator. This would include persons such as pilots, shoreside personnel coordinating berthing operations, those rendering services in direct connection with navigation, stevedores engaged in the loading and discharging process. Such a proposal was rejected in the final draft of the 1976 Convention. So it could be reasonably inferred that the Convention did not intend to include persons merely rendering services of loading and discharging a vessel. Managers or operators are only those who directly contributed to the management or operation of the vessel. See Harold K. Watson, *The 1976 IMCO Limitation Convention: A Comparative View*, 15 Houston Law Review 249, 257 (1978).

as the owner or bareboat charterer, or any other natural or juridical person to whom the responsibilities of the owner or bareboat charterer have been formally assigned.[152] Likewise, the Dictionary of China Maritime Law defined "operator" as the owner or demise charterer, or other enterprise legal person to whom the responsibilities of owner or demise charterer have been formally assigned, including a legal person authorized by the shipowner to operate the vessel.[153] Thus, it may be inferred that the ship operator is the person operating the vessel for the shipowner or demise charterer pursuant to the assignment contract concluded between them with the shipowner being the entrusting party and the ship operator being entrustee.

In general, ship operators perform multi functions in the marine transport. They use vessels to engage in transport or other commercial activities over the water and implement substantive and effective control on the vessel during the operation period. For example, operators may operate the vessel in their own name, e.g. concluding contract of carriage or charter parties, issuing bill of lading and other transport documents, collecting freight or hire etc. Ship operators have the right to possess, use, profit from and conditionally dispose of the vessel. Practically the scope of "operators" is subject to judicial interpretation based on a case-by-case analysis. For example, in the much-disputed case of *M/V Jingshuiquan*,[154] one of the main issues is to determine whether the defendant, who was entrusted to be in charge of cargo transportation affairs including collecting freight and issuing the bill of lading on behalf of the shipowner, was the ship operator in the particular voyage and accordingly entitled to the protection of limitation of liability in the Maritime Code. It appeared the court arguably rendered the affirmative answer.

Non-Vessel Operating Common Carrier

It is to be noted that in China with the development of container and multi modal transport, non-vessel operation business was separated from the traditional freight forwarding by reference to the shipping practice in the U.S. and the reality of the Chinese shipping market.[155] As such, the concept of non-vessel operating common carrier (NVOCC) was introduced by the International Shipping Regulations of People's Republic of China for the first time from January 1st of 2002.[156] The

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[152] See Article 2 of the U.N. Convention on Conditions for Registration of Ships (not yet in force).

[153] The Maritime Code mentioned only one type of operator in Article 8, which provides that with respect to a state-owned ship operated by an enterprise owned by the whole people having a legal person status granted by the State, the provisions of this Code regarding the shipowner shall apply to that legal person. Certainly there are also other types of operators even though there are no relevant provisions in the Code.

[154] Cases in Maritime Law, Law Press (2003), p. 291-301. The vessel *Jingshuiquan* was sank together with cargo on board on her voyage from Dalian to Huangpu. In this case a number of issues arise relating to both substantive aspects and procedural aspects of the limitation provisions in the Chinese maritime law (primarily China Maritime Code and Special Maritime Procedure Law).

[155] Still some objected separating non-vessel operation from the traditional freight-forwarding services, and suggested to set up the uniform administrative laws and regulations for the freight-forwarding business rather than separating it and creating the new legal concept of NVOCC.

[156] The Regulations, promulgated by the State Council, came into force on Jan. 1st of 2002. Art. 7(2) of the Regulations provides that non-vessel-operating carriage refers to the international ocean transportation that the non-vessel-operating carrier, in the name of the carrier, receives the cargo from the shipper, issues its own bill of lading or other transport documents, collects freight from the shipper, accomplishes the international ocean transport of cargo through international ocean carrier, and assumes the responsibilities of the carrier.

Regulations are the first law in China administratively governing the international shipping business and its auxiliary business. The Regulations provides that anyone who is to engage in NVOCC business in China must form a corporate entity in China, register bills of lading and provide a deposit of RMB800,000 as security for the debts which may arise from non-performance or improper performance of NVOCC's obligations or administrative penalty which may be imposed upon the NVOCC.[157] In accordance with the Regulations, the Ministry of Transport has formulated the Implementation Rules for the International Shipping Regulations, which came into force since 1 March 2003.

In the U.S., NVOCC was originated from freight forwarder.[158] Shipping Act 1984 of the United States defined "NVOCC" as the common carrier[159] that does not operate the vessel by which the ocean transportation is provided, and is a shipper in its relationship with the ocean common carrier.[160] The 1984 Act also provides for NVOCC to operate under the same rules as any other carrier in the trade. An NVOCC is a company that provides common carrier service by renting space on ships owned and operated by a vessel owner and providing additional services to shipper customers. Under the 1998 Ocean Shipping Reform Act to modify the 1984 Shipping Act, NVOCC and freight forwarders are both named as ocean transportation intermediary (OTI) but with strict distinction.[161]

The commercial role that NVOCC plays in the maritime industry determines its peculiar legal status. He does not own the vessel personally, but he concludes a contract of carriage with the shipper in its own name, issues its own bill of lading, collects freight, and is responsible for performance of the contract as a carrier; at the same time, he is shipper of cargo or charterer (in case of chartering transport) vis-a-vis

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[157] See Article 7 and 8 of the Regulations. For a discussion of functions of the Regulations, see Yu Shicheng & Wang Yu, *Integration of Deregulation and Regulatory Administration: Some Comments on the Regulations of the People's Republic of China on International Maritime Transportation*, 9 Journal of International Maritime Law 569 (2003)

[158] Freight forwarder is used to signify either a forwarding agent or what the United States would call a non-vessel operating common carrier (NVOCC). Outside of North America, the expression "freight forwarder" is often used to describe both an intermediary who enters contracts o f carriage as principal, then sub-contracts to actual carriers, and also an intermediary who acts merely as an agent, arranging contracts of carriage on behalf of the cargo-owner.

[159] Under the common law, a distinction is made between common carriers and private carriers. A common carrier by sea is someone who holds himself out as willing to carry for freight for anyone who wants to use his services, with reasonable despatch and at a reasonable cost. Common carriage of goods by sea is carried out under bills of lading or waybills or ship's delivery orders. A common carrier is subject to a stringent legal regime. A private carrier is someone who carries only for particular persons or who genuinely reserves the right to choose his customers. Private carriage is carried out under charter parties, either through the hire of the ship (in bareboat/demise charter parties) or the hire of the services of the ship (in voyage/time charter parties). It involves a lesser responsibility than that imposed on the common carrier.

[160] Section 3 of the 1984 Shipping Act. (46 App. USC 1702(17)(B))

[161] This Act came into force as of May 1st, 1999. Section 102 of the 1998 Ocean Shipping Reform Act provides that "ocean transportation intermediary" means an ocean freight forwarder or a non-vessel-operating common carrier…the term 'ocean freight forwarder' means a person that-- (i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) processes the documentation or performs related activities incident to those shipments; and the term 'non-vessel-operating common carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

the actual carrier. Recent authorities showed that there had been a growing acceptance of the fact that NVOCC could and did contract as principal instead of as agent for the cargo owner to arrange for the carriage[162], and when concluding the contract for the carriage of goods with the shipper, he is deemed as the carrier, and accordingly enjoys the right to package limitation of his liability. However, here the question arises as to whether he has standing to invoke the statutory global limitation.

To enjoy the protection of limitation of liability, the NVOCC has to be shipowner, charterer or operator. Obviously he is not shipowner since he does not own the ship, neither is he a charterer except in chartering transport. So the only possibility is whether NVOCC can be regarded as operator for purposes of limitation of liability. NVOCC is distinctly different from ship operator. As indicated above, operators are those who have the right to possess, use, profit from, and conditionally dispose of the vessel, while the NVOCC, not owning or operating the vessel, solely engage in commercial transportation.[163] Consequently, under the current China Maritime Code, NVOCC is not within the protection of limitation provisions.

2.1.3 Manager

The norm of ship manager is quite popular in modern shipping industry. As maritime industry is developing in a more and more specialized direction, there are more participating role players and specialists playing their part in pursuit of the ultimate goal, i.e. the efficient transportation of goods by sea. Thus, the management company came into being to allow for efficient and central management and control as well as releasing the shipowner's burden due to his lack of management knowledge and experience.[164]

However, the definition of managers has not yet been clarified for purposes of limitation of liability. Indeed, in shipping practice sometimes it is not an easy task to distinguish between ship manager and ship operator, since their functions could be

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[162] Surprisingly, the U.S. courts reached quite conflicting decisions in respect of the status of NVOCC. For instance, in *Kukje Hwajae Insurance Co Ltd v The M/V Hyundai Liberty*, (2002) 294 F. 3d 1171; 2002 AMC 1598 (9th Cir.), it was arguable to hold the NVOCC acting as agent of shipper/cargo owner when it contracted with the ocean carrier to ship the cargo owner's goods, and as a result, the cargo owners/shippers were bound by the forum-selection clause in the bill of lading of the ocean carrier. While in *James N. Kirby Pty Ltd v. Norfolk Southern Railway Co*, (2002) 300 F. 3d 1300; 2002 AMC 2113 (11th Cir.), it was held that the NVOCC instead of cargo owner was shipper in its contractual relationship with the actual carrier. Although the latter decision is favoured by most of other shipping countries, there are still some courts in the U.S. in support of the former one.

[163] However, In *re Jiyang Container Limited Co.*, Qingdao Maritime Court No.49 [2001], the court held that Jiyang Container Limited Co. as the NVOCC was entitled to limit his liability against the cargo owner. The court might be wrong in holding the NVOCC as "operator", however, there were good points in discussing the role which the NVOCC plays in the modern shipping industry from perspectives of the principle of fairness, balance of legal remedies as well as the fast development of container transport.

[164] In the modern shipping industry, corporate structure of beneficial owners, managers, and vessels is very common with the desire to limit liability by forming one-ship companies and the need for efficiency in management. This structure generally takes the following forms: ships of a fleet are each individually owned by a one-ship company to limit exposure to liability, the many one-ship companies are owned by the beneficial owners, and the vessels within the fleet are operated by a vessel management company. See Daniel H. Charest, *A Fresh Look at the Treatment of Vessel Managers Under COGSA*, 78 Tul. L. Rev. 885, 889 (2004).

overlapped to some extent.[165] The role of the ship manager is difficult to characterize primarily due to the wide variety of possible configurations between owner and manager.

Reference could probably be found in some relevant legal documents. In the Guideline for Maritime Legislations drafted by the CMI, it was indicated that "the management of a vessel is sometimes entrusted to an independent management company which acts as an agent for the owner, the costs and risks connected with the management being borne by the owner. In view of the fact that the contract between the owner and the manager is not of a maritime nature…." Also, in the Code of Ship Management Standards (ISMA Code) drafted by the International Ship Managers' Association[166], ship managers are defined as those entrusted to control and/or are responsible for ship management or crew management by way of contract or other legally binding documents.

To sum up, while shipowners, demise charterers and operators are those normally operating the ship for marine transport, the ship manager, in a strict sense, is the person entrusted by a shipowner, demise charterer or ship operator to manage the vessel, that is, he is in charge of safety, manning, equipment, maintenance and repair, inspection and other technical issues.[167] Ship managers are in fact integral to the shipowner, since measures taken on behalf of the owner in furtherance of the enterprise of moving ship and cargo over water are done by and through the ship manager. Ship managers have great decision-making powers in vessel and crew managements, to some extent they can be regarded as the representative of the shipowners.

However, the China Maritime Code, although modeled on the 1976 Limitation Convention, does not include the term "manager" into persons entitled to limit as the international conventions did. It is assumed that the omission was due to the unique situation of state ownership when the Code was enacted and ship managers did not widely exist at that time. Ship management is a relatively new business in China.[168] Up to now there is no particular act to regulate ship management business in China. The administrative aspects of ship management are largely governed by the

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[165] Ship managers may provide various services to shipowners. In a broad sense, the ship manager may take on the responsibility of performing the operational and business functions of the owner. Depending on the owner's needs, the extent of the managers' services can encompass the entire operational and business aspects of a fleet of ships or can be an isolated service that merely supplements the owners' traditional functions. *Supra* note 31.

[166] ISMA is the world's largest association of ship management companies.

[167] Ship management is considered as assistant operational activities in relation to the marine transport according to the International Shipping Regulations of China. Article 30 of the Regulations provides that international ship managers, entrusted by shipowners, charterers or ship operators, engage in vessel purchase and chartering, mechanical and marine affairs, maintenance, crew recruitment, training and manning, and other services that maintain technical conditions and normal navigation etc.

[168] This was evidenced by the provision in Article 8 of the Code where in respect of ship operators, only state-owned ship operator was mentioned in the Code. In the past times of planned economy, shipping companies were primarily large-scale state-owned enterprises which generally operated and managed vessels themselves. Nowadays in times of market economy when large quantities of private shipping companies have arisen, shipowners start to entrust specialized persons for efficient control of vessels, as promotes the development of ship management companies. Besides, the application of safety management system (SMS) further facilitates the booming of ship management industry especially for large numbers of small-scale shipping companies which find it not economical to establish the SMS themselves.

International Shipping Regulations and its Implementation Rules which were promulgated by the Ministry of Transport and entered into force as of March 1st, 2003.

Currently in the shipping practice in China, ship manager is regarded as the agent of the shipowner pursuant to the civil law to enjoy the right to limitation granted by Article 205 of the Code.[169] In consideration of the equally important role of ship managers as compared to the shipowners in modern maritime industry, it is submitted that the status of managers in the limitation regime should be clarified in the judicial interpretation of the Supreme Court in China, and later when amending the Maritime Code they should be included into the shipowner category for purposes of limitation of liability.

So far under the U.S. law, it seems that ship operators and managers are not within the protection of limitation of liability since the Limitation Act does not expressly state these types of people are included in the persons entitled to limit. However, under certain circumstances depending on the underlying arrangement of management or operation between the parties involved, managers or operators could possibly be granted owner or owner *pro hac vice* status and thereby entitled to limit their liabilities according to sections 183 and 186 of the Act. As the terms of the underlying management or operating contract may vary considerably, for limitation of liability purposes, it is necessary to examine the contract thoroughly to determine the power and responsibility the manager or operator has undertaken. For example, *In re United States,*[170] both the operator and the owner petitioned for limitation of liability. Despite the fact that there was no demise charter party between the parties, the court held that the operator was, in effect, an owner *pro hac vice* and accordingly granted the same right of limitation to the operator as to the shipowner, because the operator was in actual control of the vessel in the sense that it equipped, manned, victualled and navigated the vessel, moreover all the officers and crewmembers were subject entirely to the operator's orders and were considered as its employees. Since managers or operators often fulfill the role of a shipowner and therefore incur the liabilities a shipowner would incur in modern shipping industry, it is advisable for the U.S. Limitation Act to expressly extend this privilege to these people.

2.1.4 Charterer

Charterers have been universally acknowledged as entitled to the right of limitation under both Limitation Conventions, although till now there is not any authoritative decision defining who is a "charterer". It may encompass a demise charterer, a time charterer, a voyage charterer, a time trip charterer, a consecutive voyage charterer, a sub-charterer and etc. For example, in *The Tasman Pioneer*,[171] the sub-time charterers were regarded as the "owner" within the meaning of the New Zealand limitation legislation that adopted the 1976 Limitation Convention. Both the 1995 Merchant Shipping Act of the U.K. and the China Maritime Code expressly provide for the

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[169] Article 205 provides: If the claims set out in Article 207 of this Code are not made against shipowners or salvors themselves but against persons for whose act, neglect or default the shipowners or salvors are responsible, such persons may limit their liability in accordance with the provisions of this Chapter.

[170] 259 F.2d 608, 1959 AMC 982 (3d Cir. 1958)

[171] [2003] 2 Lloyd's Rep. 713. See also, *Laemthong International Lines Co. Ltd. v. BPS Shipping Ltd.*, [1997] 149 A.L.R. 675, 681.

charterers' right to limitation of liability without distinguishing the types of charterers. The legislative intent to extend the limitation provisions to the charterers was that it was not justifiable to exclude charterers from the benefits enjoyed by shipowners; the charterers are often the effective operator of the ship and should have the same benefit of limitation as the shipowners.

It is generally accepted that both the 1957 and 1976 Conventions cover all types of charterers;[172] however, the Conventions do not make further specific provisions on charterer's right to limitation. The issue stands out in some cases in the U.K. as to whether the term "charterer" in the Limitation Convention was to be construed as restricted to charterers acting *qua* shipowner or without any such restriction. Since limitation provisions in the China Maritime Code is drafted by reference to the 1976 Convention, clarification of this issue is also important to the legislation and the judicial practice of China.

In *The Aegean Sea,*[173] Mr. Justice Thomas held that, according to the wording and structure of the 1976 Convention and its evolution history, a voyage or time charterer is justified in being afforded rights of limitation only when acting as *qua* owner. To prove the point, words in Article 6(2) of the 1957 Convention, "in the same way as they apply to an owner himself", were quoted as suggesting that a charterer is to be treated as a shipowner and entitled to limit when he acts as a shipowner. The court, by further relying upon Article 1(2) of the 1976 Convention that the term "shipowner" shall include the owner, charterer, manager or operator of a seagoing ship, concluded that a charterer could limit his liability as *qua* shipowner.

In *CMA CGM SA v. Classica Shipping Co. Ltd. (The CMA Djakarta),*[174] the same issue arose as to whether the time charterers were able to limit their liability in respect of the claims made by the shipowners under Article 1(2) of the 1976 Convention. At the first instance, David Steel J undertook to examine the historical development of the limitation of liability under English shipping law, and followed the approach in *The Aegean Sea* that the use of an all embracing category of "shipowners" in Article 1(2) of the Convention as manifestation of an intention to restrict the ability of charterers to limit to situations where a charterer was acting as *qua* shipowner. Consequently, the time charterer was not entitled to limitation because limitation was

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[172] During the drafting of the 1957 Convention, it had been suggested by the American delegation to restrict the scope of charterers to demise charterers as in its domestic law, but most other countries were in support of charterers covering all types of charterers. And the 1976 Convention right followed the 1957 Convention in this respect.

[173] *The Aegean Sea,* [1998) 2 Lloyd's Rep. 39, the vessel *Aegean Sea*, during proceeding to berth at La Coruna to discharge a cargo of crude oil on voyage charter, grounded on the Torre de Hercules rocks, broke in two and exploded. The vessel and most of her cargo were lost and there was large-scale pollution of the environment and damage to private property. The owners sought to recover the value of the vessel, the bunkers on board, the freight and indemnity for pollution claims, liability to CRISTAL, and salvage services from the charterers for nomination of unsafe port.

[174] [2003] 2 Lloyd's Rep. 50, [2004] 1 Lloyd's Rep. 460. An explosion occurring on board the time-chartered container vessel *CMA Djakarta* caused substantial damage to the ship and other cargo and consequently incurred salvage being performed and general average declared. The explosion was found being caused by two containers of bleaching powder in breach of time charterer's obligation under the charter party which excluded carriage of dangerous or flammable goods. The owners claimed against the time charterers damages comprising the cost of repairing the vessel and salvage remuneration paid to salvors, together with an indemnity in respect of their exposure to cargo claims and general average contributions

available to charterers only when they were undertaking activities associated with ownership, which did not include shipment of a dangerous cargo, as was an act done in the charterers' capacity as charterers.

However, the Court of Appeal rejected the approach adopted by Thomas J in *The Aegean Sea* and by David Steel J at first instance and started with a different perspective. Indeed, the crucial question in the case was of statutory interpretation of a particular term derived from an international convention. According to the Court of Appeal, the general approach to interpreting an international convention is to have regard to its own language and structure, free of domestic law perceptions and principles (i.e. English legislation in this case). The Convention is to be interpreted by reference to broad and generally acceptable principles of interpretation[175] which may be found in such international instruments as the Vienna Convention on the Law of Treaties 1969, Articles 31 and 32.[176] Consequently, the court was obliged to ascertain the ordinary meaning of the words used in their context and also taking into account the object and purpose of the Convention.[177] The court might have recourse to the *travaux preparatoires* and the circumstances of the conclusion of the convention, to confirm the ordinary meaning of the word, or, reassess the meaning when the adoption of the ordinary meaning renders the convention ambiguous or uncertain or leads to a manifestly absurd or unreasonable result. The interpretation given to the same term in a previous international convention can only be referred to once the ordinary meaning has been ascertained.

Looking at the convention as a whole, the court concluded that the mere fact that "charterer" was part of the definition of "shipowner" does not mean that the charterer needed to be acting as a shipowner in order to claim limitation, the word "charterer" was to be given its ordinary and not a restricted meaning,[178] that is, a charterer acting in his own capacity, not as a charterer acting in some other capacity such as *qua* owner which was only to place a gloss upon the wording of the Convention and accord it a meaning other than its ordinary meaning. Moreover it would be often difficult to make the distinction in that certain responsibilities, such as loading of cargo, are allocated variously by the terms of the charter party.

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[175] See e.g. *Stag Line Ltd v Foscolo, Mango & Co Ltd.*, (1932) AC 328; *James Buchanan &Co Ltd v. Babco Forwarding & Shipping (UK) Ltd.*, (1978) AC 141; *Fothergill v. Monarch Airlines Ltd.*, (1981) AC 251, and *Morris v KLM Royal Dutch Airlines,* (2002) 2 AC 628.

[176] Article 31 of the Vienna Convention (General Rule of Interpretation) provides: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Article 32 (Supplementary Means of Interpretation) provides: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

[177] It was common ground that the object and purpose of the 1976 Convention was (a) to encourage the sea transport and promote international trade; (b) to provide for higher limits than those previously available in return for making limitation more difficult to break; and (c) to enable salvors to limit their liability in the same way as owners and charterers, reversing *The Tojo Maru*.

[178] The 1957 Convention has for the first time extended limitation of liability to charterers, but there was nothing in this convention which suggested a departure from adopting the ordinary meaning of the word "charterer" as used in the 1976 Convention. To confirm that ordinary meaning no assistance was obtained from the *travaux preparatoires*.

Consequently, time charterers were entitled to limit liability according to the terms of the Convention but only in relation to limitable claims.[179] The significance of the decision was that in the future a charterer's ability to limit would depend on the type of claim that was brought against him rather than the capacity in which he was acting when his liability was incurred. The Court of Appeal has virtually reversed the earlier authority that charterers, although named in Article 1(2) of the 1976 Convention, were limited to where they purported to act in the capacity of "owners" (i.e. *The Aegean Sea* and *The CMA Djakarta* at the first instance).[180]

The result of *The CMA Djakarta* was soon relied on in the subsequent case of *The Darfur.*[181] The court followed the decision of the Court of Appeal in *The CMA Djakarta* and held that it matters not that it is owners who are seeking to limit against claims brought by charterers rather than, as in *The CMA Djakarta*, the other way round. The issue turns on the scope of the claims that are subject to limitation and not the class of persons entitled to limit.

Hence, the position of charterers under the 1976 Convention is not governed by the question of status but by reference to the claim made. The question of status may be a complex and elusive concept, capable of varying with the circumstances. It was not logical to differentiate the roles actually performed by charterers between those where they acted as *qua* shipowner and those where they acted in another capacity.[182] Besides, a logical consequence of limitation based on insurability appears to demonstrate that the right of limitation should be determined by the nature and character of the claim, not of the person liable for it. This will undoubtedly simplify the law and make it more certain. As a matter of fact, same insurance coverage for charterer's liabilities is generally available to charterers no matter whether they are likely to incur liability as *qua* shipowner or some other roles. Whether a claim is limitable will certainly raise a question of interpretation and although difficult and complicated questions may arise, the general approach to the question of interpretation is well appreciated.

As we know, both Conventions cover all types of charterers that traditionally include demise charterer, time charterer, voyage charterer, time trip charterer, consecutive voyage charterer, and sub-charterer etc. However, with the development of shipping industry and cargo-carrying vessels, this traditional scope of charterers is also faced with evolution. Nowadays it is very common that the modern container trade is operated on the basis of space sharing arrangements or slot charters, under which

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[179] Further discussion on what claims are limitable will be found in Chapter 3.

[180] See generally, *Analysis and Comment: CMA CGM SA v. Classica Shipping Co. Ltd.*, 10 Journal of International Maritime Law 122 (2004)

[181] [2004] 2 Lloyd's Rep. 469. The vessel *Darfur*, while proceeding along the River Seine, collided with the vessel *Happy Fellow*. The collision caused serious damage to both vessels as incurred salvage services, as well as personal injury to crewmembers of the *Happy Fellow* and damage to/late delivery of the *Darfur* cargo. The time charterer of *Darfur* claimed against the owners of *Darfur* for damages for breach of charter party and/or breach of duty of care and various indemnity claims and expenses as a result of the collision and subsequent deviation. The issue was whether the time charterer's claims were limitable and needed to be brought against the limitation fund.

[182] For instance, stowage of cargo could be arranged by either charterers or shipowners. It would be difficult for the courts to determine whether the liability was incurred by a particular charterer in his capacity as a cargo owner or a shipowner on a case-by-case basis for purposes of applying limitation benefit. Chen Xia, *Limitation of Liability for Maritime Claims—A study of U.S. Law, Chinese Law and International Conventions*, Kluwer Law International, 2001, p.5-6

participants in a consortium charter space, usually a fixed number or percentage of container "slots"[183], on the vessels on particular voyages. Slot chartering grows quickly and now accounts for most of the worldwide cargo container trade, and the slot charterer has been defined as a party who has the right to use a specified part of the cargo carrying capacity of a vessel on a particular voyage and who often issues his own bills of lading.[184] Thus, for purposes of limitation of liability, the question arises as to whether "slot charterers" are granted the right to limit as charterers.

In *The Tychy*,[185] "charterer" was presumed to include a slot charterer in the context of ship arrest under the International Convention Relating to the Arrest of Sea-Going Ships 1952 (1952 Arrest Convention). The question whether a slot charterer or the charterer of part of a ship should be included in charterer was also referred to in *The CMA Djakarta* but it is submitted that the better view is that such charterers (and indeed other types of part charterers) might not so readily admit to inclusion in the definition as time and voyage charterers but the precise boundaries of the definition must be regarded as being wide open and left to another day.

Traditionally, persons entitled to limit generally have an interest in the whole ship and the limit of their liability is calculated by reference with the tonnage of the whole ship. However, with the evolution of the limitation regime in shipping industry, nowadays the guiding philosophy has been the desire to afford the right to limit liability to all those who could incur liability directly as a result of the operation of the vessel. Since the slot charterers are often involved in the operation of the vessel which gives rise to direct liability, it seems reasonable to allow them to enjoy limitation of liability by reference with the tonnage of the ship. Otherwise, the situation would be inherently unfair for the slot charterers, that is, while the slot charterers are excluded from limitation against the claims by the cargo interests, the shipowners are entitled to limitation in the indemnity claim by the slot charterers.[186] Thus, theoretically, slot charterers should be included in the scope of charterers within limitation regime.[187]

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[183] Space on container vessels is usually chartered by "slot", each slot representing the space required to accommodate one TEU (Carrying capacity on container vessels is customarily expressed in terms of the space required to carry a twenty-foot container (TEU) or a forty-foot container (FEU)).

[184] See Patrick Griggs & Richard Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p. 12-13

[185] *The Tychy*, [1999] 2 Lloyd's Rep. 11, where Lord Justice Clarke observed that slot charters satisfy the characteristics of a charter-party identified by Mr. Justice Hobhouse in *The Torenia*, [1983] 2 Lloyd's Rep. 210, 216. He further stated, "...it makes no sense to hold that where "A" charters the whole of the parcel tanker, one of his ships can be arrested to secure a maritime claim arising in connection with that tanker, but where he charters, say half the tanker, his ships are immune from arrest in respect of an identical claim...it thus can be seen that there is no distinction in principle between a slot charter and a voyage charter of a part of a ship. They are both in a sense charterers of space in a ship; a slot charter is simply an example of a voyage charter of part of a ship."

[186] Richard Williams, *What limitation is there on the right to limit liability under the 1976 Limitation Convention*, International Journal of Shipping Law 117, 119 (1997)

[187] It should be noted here that problems frequently arise as to the interpretation of Article 2 of the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR). The majority of the European countries have ratified the CMR; however, the CMR Convention is notoriously difficult to interpret. The convention regulates successive carriage but not sub-carriage which is nowadays a common way of organizing transports on the market. This has led to the development of diverging case law in the CMR countries.

The application of Article 2 of the CMR, dealing with the liability of the road carrier during the non-road stage of the transport, brings some serious problems. These problems are primarily due to the

Suppose the slot charterers are to be allowed to limit liability under the Convention, it will be necessary to clarify what standard shall be applied to determine the limits -- calculated by reference to the proportion of the ship's space which the slot charterer has actually chartered, or by reference to the total tonnage of the vessel as the custom goes. Since the slot charterer had only contracted for the use of merely part of that tonnage, it would appear unfair for him to be exposed to a disproportionately high limit based on the entire tonnage and not the tonnage he has chartered.

It is noteworthy that the U.S limitation law is quite exceptional in respect of the charterers' right to limitation since under Section 186 of the U.S. Limitation Act only a bareboat or demise charterer may claim limitation as an owner *pro hac vice*,[188] that is, voyage and time charterers are expressly excluded from the protection of the limitation regime.

As a result, the differentiation between various charter parties has been a focus of many litigated cases in the United States. The basic criteria to distinguish a demise or bareboat charter party from the others is whether the charterer manned, victualled and navigated his vessel at his own expense or by his own procurement.[189] If he did, he would be held to have been in the capacity of owner and would be entitled to limitation of liability as owner *pro hac vice.*[190]

Under the Limitation of Liability Act, a charterer is deemed to be owner of a vessel only when possession, command, and navigation of the vessel are wholly relinquished to the charterer.[191] Moreover, the charter must state expressly that the owner grants the charterer the sole and exclusive possession and control of the vessel. In determining if a charter is a bareboat or demise charter the courts look into not only

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intricate language of the provision as well as to the intricacy of the process appointed to determine the law applicable on the hypothetical contractual relationship between the shipper and the other carrier during the non-road stage under Article 2. According to this Article, the CMR also governs the relationship between shipper and road carrier for the transport during the non-road stage, with the exception that the liability of the road carrier is governed by the other transport regime (such as the Hague Rules or Hague-Visby Rules) instead of the CMR. The prerequisites of this exception rule is that damage to the goods, which occurred during the carriage by the other means of transport, has been caused not by an act or omission of the road carrier, but by an event which could only have occurred in the course of and by reason of the carriage by that other means of transport (e.g. the sea). This exception rule has caused many problems. In particular, the legal puzzle is how to match the main contract between the shipper and the road carrier with the subcontract between the road carrier and non-road carrier. It seems that courts in the CMR countries have rendered different interpretations and reasoning based upon considerations whether the interests of the shipper or the road carrier prevail. See generally, Johan Schelin, *CMR Liability in a Law & Economics Perspective*, Transportrecht 382 (2002)

[188] See 46 U.S.C. §186.

[189] *Id.*

[190] In *Coastal Cargo Co. Inc. v. M/V Gustav Sule*, 942 F.Supp. 1082 (E.D.La. 1996), demise or bareboat charter was defined as "a long-term agreement vesting in one person most of the incidents of ownership of vessel, while another retains general ownership and right of reversion". Also in *Rose v. Chaplin Marine Transport, Inc.*, 895 F.Supp.856 (S.D.W.Va. 1995), the court described bareboat charterer as standing in the shoes of the owner and assuming "duties and responsibilities pertinent to ownership" while the owner was relieved of the same.

[191] See, e.g. *Guzman v. Pichirilo*, 369 U.S. 698, 1962 AMC 1142 (1962); *In re Martell*, 742 F.Supp. 1147 (S.D.Fla. 1990); In *Complaint of Tom-Mac, Inc.*, 76 F.3d 678 (5th Cir. 1996)

its stated terms but also the intent of the parties to the contract.[192] Thus, the charterer, not the owner, must be required under the terms of the charter to procure, and must actually, procure the necessaries of the vessel and equip, fuel, supply, man, maintain, victual and navigate the vessel. Whereas a charter which merely purports to be a demise charter, but under which the owner procures any of the necessaries for the vessel, will likely preclude the charterer from taking advantage of the Limitation Act.[193] Thus, where the only activity of the charterer is paying for the hiring of a vessel, which is crewed or equipped by her owner, there will be no bareboat charter and no section 186 standing.[194]

The fundamental characteristic of a demise or bareboat charter is that the exclusive possession, command, and navigation of the chartered vessel have been surrendered from the owner to the charterer during the charter period.[195] The charter party need not employ technical terminology in any particular manner in order to constitute demise. Rather, the agreement and the conduct of the parties must clearly reflect delivery of control and possession of the vessel to the demise charterer. Anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. A party seeking to establish a demise of a vessel is required to prove that the contract does not evidence some other arrangement consistent with the retention of control by the owner.[196] The allocation of responsibility for maintenance and repair of the vessel during the charter term is also considered in determining whether a demise was created.[197] To conclude, the entire charter agreement as well as the parties' actions shall be examined closely with emphasis placed upon the transfer of possession and control if there is any doubt whether the charter constitutes a demise.[198]

Exclusion of voyage or time charterer from protection of the U.S. limitation law was based on the foregone allegation that only demise charterers could incur the same liabilities as shipowners did. Indeed, nowadays liabilities incurred by voyage or time

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[192] Therefore, a charter could be a bareboat or demise charter without expressly stating so, and without using the magic "equip, fuel, supply, maintain, man, victual and navigate" wording. See, e.g., *In re USNS Mission San Francisco*, 259 F.2d 608, 609 (3d Cir. 1958).

[193] See, e.g. *Hills v. Leeds*, 149 F. 878 (D.Me.1907), aff'd per curiam, 158 F. 1020 (1st Cir. 1908). The charterer was denied the benefits of limitation of liability in that the owner provide the personnel and pay their wages even where the contract otherwise evidences a clear intent to transfer management and control to the charterer.

[194] However, charter parties sometimes may not be easily labelled one way or the other. In *In re M/V Peacock*, 1983 AMC 1200 (N.D. Cal. 1982), the court found that the charter in question contained aspects of both a time and demise charter. Given the evidence that the charterer did not remain primarily responsible for the employment of the operating crew, the vessel insurance and its navigation, the charter was found not a demise charter. Similarly, in *The Torrey Canyon*, 281 F.Supp. 228 (S.D.N.Y. 1968), one of the issues was to determine whether the petitioner was within the statutory meaning of demise charterer or owner *pro hac vice*. Eventually the argument defining the petitioner as a time charterer prevailed, since it was found that the clear import of the charter party's terms place squarely upon shipowners the responsibility for procuring the goods and services needed to man, victual and navigate the ship. The charter party, drafted with important business considerations of ship financing and tax avoidance, neglected to take into considering limitation of liability.

[195] The fundamental principle was articulated by the Supreme Court in *Marcardier v. Chesapeake Ins. Co.*, 12 U.S. (8 Cranch) 39 (1814). See also *United States v. Shea*, 152 U.S. 178 (1894).

[196] See *Guzman v. Pichirilo*, 369 U.S. 698, 699-700, 1962 A.M.C. 1142, 1143-1144 (1962).

[197] See *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 676, 1972 A.M.C. 207, 213 (2d Cir. 1971).

[198] See Sheldon A. Gebb, *The Demise Charter: A Conceptual and Practical Analysis*, 49 Tul. L. Rev. 764, 768 (1975).

charterers are no less than those by the demise charterers in modern maritime practice. The out-of-date approach adopted by the U.S. limitation law to distinguish demise or bareboat charterers from other types of charterers in respect of charterer's rights to limitation of liability disregards the commercial role played by voyage or time charterers in modern shipping industry. As a matter of fact, charterers' right to limitation has been widely recognized by the legal regimes around the world. To achieve the goal of limitation regime to protect the shipping industry squarely, it is suggested to extend the scope of persons entitled to limit to include all types of charterers within the U.S. limitation law.[199]

2.2 Salvor

As is well known, salvage services are very important both in the saving of property and lives as well as protection of environment, therefore the law of salvage should be drafted in favor of the salvors so as to encourage them to engage in this business. Both Article 8 of the 1910 International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea[200] and Article 18 of the 1989 International Convention on Salvage[201] expressly provide that the salvor is liable for damage caused by their own negligence during the salvage operations; however, neither Convention deals with the salvor's right to limit his liability to damages for his negligence.

Traditionally, salvors could always seek limitation for negligence in navigation or management of their vessel used in salvage operations. However, in practice, salvage services are often partly or entirely performed away from the salvage vessels, which means that salvors would probably be deprived of the benefit of limited liability in many situations. That was exactly what happened in the decision of the English House of Lords in *The "Tojo Maru"*[202], in which it was held the salvor was not entitled to limit his liability because the diver's negligent act was not an act "done in the management" of the salvor's tug nor an act done "on board" that tug. Lack of such protection is undoubtedly harmful to salvage services in particular and the shipping industry in general. In response to pressure from international salvage interests, the 1976 Convention introduced a unique provision by creating a separate category of persons known as salvors for purposes of limitation of liability. Salvor is defined by Article 1(3) of the 1976 Convention as any person rendering services in direct connection with salvage operations. Thus, to enjoy the privilege of limitation, the negligent salvor is not required to be operating from a tug or other salvage vessel.

More specifically, according to Article 6(4) of the Convention, a salvor who is "not operating from any ship", e.g., a salvage officer in an office planning the salvage operation but doing so negligently, or who is "operating solely on the ship to or in respect of which, he is rendering salvage services", e.g., the situation which arose in

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[199] Besides, one of the fundamental principles that underlay the 1976 Convention was to establish a limit of liability that accommodates commercial insurability. Since in many cases the insurance was the only asset that would constitute the limitation fund, the same consideration of limitation of liability should also apply to the charterers with liability insurance as shipowners.

[200] This Convention entered into force on March 1st, 1913, with its Amending Protocol of 1967 coming into force on August 15th, 1977.

[201] This Convention entered into force on July 14th, 1996.

[202] (1971) 1 Lloyd's Rep. 341, where the diver, while working underwater on the salved vessel, fired a bolt gun when the tank was not gas-free yet, the explosion that ensued caused substantial damage.

The Tojo Maru, shall be entitled to calculate the limit of his liability by reference to a notional tonnage of 1,500 tons.[203] So the *Tojo Maru* problem would not arise under the 1976 Convention. Besides, the provisions on salvors in the 1976 Convention have been incorporated into Lloyd's Open Form since its 1980 version, the most commonly used salvage agreement.

Following the formula in the 1976 Convention, under both the U.K. Merchant Shipping Act of 1995 and the China Maritime Code[204], salvors are specially entitled to limitation of liability, and the right to limitation is extended to salvor's agents and employees for whose acts or negligence salvors are responsible. A salvor has the same statutory right as any other shipowner to limit his liability to the amount calculated according to the tonnage of the relevant salvage tug or other ships together with a special right to limit to a notional tonnage of 1,500 tons under certain circumstances applicable only to salvors, that is, if the salvor is not operating from the salving ship.

Under the American limitation of liability regime, there are no such special provisions in respect of salvors as found in the 1976 Convention. In principle, a salvor is allowed the right to limit his liability to damages as owner or owner *pro hav vice*.[205] However, it is not clear whether salvors are entitled to limitation if damage occurred when salvage services were not directly related to navigation or management of the salving vessel. Given the general judicial hostility towards the existing limitation system in the U.S. and long-standing restrictive interpretation of the Limitation Act, it is very likely that the right to limitation would be denied. However, considering the significance of the business that the salvors are nowadays engaged in to the maritime commerce and transport as well as to the marine environmental protection, and the risks they may be exposed to as shipowners, it may be advisable to extend the benefit of limitation to salvors no matter whether they are operating from the salving vessel or other location.

2.3 Other Persons

Under the 1957 Convention, the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment were afforded the right to limit.[206] While according to the 1976 Convention the right to limit is extended to "any person for whose act, neglect or default the shipowner or salvor is responsible.[207] Both the U.K. Merchant Shipping Act 1995 and Article 205 of the China Maritime Code have adopted the wording of the 1976 Convention verbatim.

Therefore, master, crew and servants are apparently covered within protection of limitation of liability under both Conventions. It is also generally accepted by many maritime nations worldwide that master and crew are entitled to limitation of liability

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[203] 1,500 tons represents the size of an average salvage-tug.

[204] See Article 204 and Article 205 of the Maritime Code.

[205] See, e.g., *United States v. Sandra & Dennis Fishing Corporation,* 372 F. 2d 189 (1967), *Dick v. United States of America,* 671 F. 2d 724 (1982).

[206] See Article 6(2) of the 1957 Convention. This was to address the *Himalaya* problem (see the case of *Adler v. Dickson*, [1954] 2 Lloyd's Rep. 267) where an employee of a shipowner might be sued in preference to the shipowner. If liable he was not only deprived of his employer's defences, but prohibited from limiting liability.

[207] See Article 1(4) of the 1976 Convention.

in their own right. Notably, the wording in the 1976 Convention appears to present an even greater outer limit. People may wonder if this wording is beyond employees or servants under traditional concepts as to encompass those independent contractors such as stevedores provided that the shipowner is responsible for their actions, although it is truly doubtful that the Convention was drafted to intend such independent entities to benefit from limitation. Probably judicial interpretations will give the indication on this point.

In contrast, the U.S. Limitation Act does not cover the master and crew of the vessel in respect of the privilege of limitation. By virtue of Section 187, the master and crew are specifically excluded from benefits of limitation.[208] Furthermore, by virtue of Section 185, the Act permits only the shipowner by instituting limitation proceedings to have all claims against him brought into concursus in an admiralty court, and the court shall enjoin any further proceeding against the shipowner or the shipowner's property with respect to any claim subject to the limitation. The master and crew of the vessel are not included in the injunction against further proceedings.

If master and crew are sued and exposed to unlimited liability, it would be possible that the liabilities shift from master and crew by indemnification to shipowners or the insurers who would not be entitled to limitation of such liabilities. Consequently, claims against master and crew would directly affect the interest of the shipowner, as would frustrate the very purpose of the limitation regime of protecting the interests of shipowners and promoting the shipping industry.[209]

The situation is further complicated by Section 183(e) of the U.S. Limitation Act where the privity or knowledge of the master of a seagoing ship shall be deemed that of shipowners in personal injury and death cases. Thus, determination of the shipowner's right to limit his liability under such circumstance could not have been made without a concurrent determination of the master's involvement and culpability. However, it is noteworthy that in the U.S. limitation of liability is specifically within the exclusive jurisdiction of federal admiralty courts, while master and crew, as excluded from the limitation regime, are liable to be sued in any court, this will create unnecessary problems if the action against the master and crew could not be stayed.[210]

Actually, there is split among American courts in deciding whether the state court action against the ship's master and crew should be stayed pending the outcome of the shipowner's limitation proceedings.[211] In *In re Complaint of Paradise Holdings,*

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[208] 46 U.S.C. 187 reads as follows: Nothing in sections 182, 183, and 184 to 186 of…shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

[209] See Donald C. Greenman, *Limitation of Liability; A Critical Analysis of United States Law in an International Setting*, 57.Tul. L. Rev. 1139, 1159-1160 (1983)

[210] See generally, Katie Smith Matison, *A Historical Trek Through the Judicial Interpretations of Sec. 187 of the Limitation of Vessel Owner's Liability Act: the Evolution of the Literal versus the Statutory Purpose Approach*, 17 Tul. Mar. L.J. 73 (1992)

[211] See generally, Marc D. Isaacs, *A Critical Defect in the Limitation of Shipowner's Liability Act: The Exclusion of the Master and Crew*, 27 Tul. Mar. L.J. 335 (2002).

Inc.,[212] the U.S. Courts of Appeals for the Ninth Circuit, in consideration of the overall statutory purpose of the limitation regime, that is, to bring all the claims together into concursus to be dealt with by the federal court at one time under the substantive and procedural rules of admiralty so as to avoid inconsistent results and repetitive litigation, disfavored literal adherence to Section 187 and instead adopted a more liberal and logical approach to construing Section 187. The court, while recognizing the claimant's right to claim against the master individually, held that Section 187 should not preclude the federal court from staying the state court action against the master of the vessel until the determination of the limitation proceeding when there existed the dangers such as depletion of the shipowners' liability insurance proceeds, intervention with the admiralty court's exclusive jurisdiction over limitation issues; problems with issues of *res judicata* and collateral estoppel, as well as multiplicity of proceedings.[213]

In contrast, the U.S. Court of Appeals for the Fifth Circuit gave the decision in *Zapata Haynie Corp. v. Arthur*[214] the other way around. The court, by relying on the decision of *In re Brent Towing Co.*[215] and adopting a literal interpretation of the plain wording of Section 187, limited application of the Limitation Act to shipowners only, and thereby refused to extend the restraining order to include the state court action against the master. The court, while recognizing the validity of the Ninth Circuit's position in finding that the purposes of the Limitation Act are inconsistent with the remedies reserved by Section 187, observed that it could hardly ignore the explicit terms of the Act and was obliged to interpret the language that Congress actually drafted. The Act provides for stay of actions against the shipowners only and the master is not covered. The court denied making judicial legislation. The reasoning for refusing to extend the stay of the action against the master was later followed in *In re Ingram Barge Co.*.[216]

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[212] 795 F.2d 756, 1987 AMC 104 (9th Cir.), cert. denied, 479 U.S. 1008, 1987 AMC 2408 (1986), where a Hawaiian passenger vessel ran over several swimmers, killing one and injuring others. An action for damages was filed in Hawaii state court against the shipowner and its master. The owner filed an action in federal district court seeking limitation and a stay of the state court action pending the outcome of the federal limitation proceeding. The court granted the injunction, and the claimants sought to dissolve the stay as against the master based on Section 187.

[213] Collateral estoppel, also known as issue preclusion, means a common law estoppel doctrine that prevents a person from relitigating an issue. Simply put, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. This is for the prevention of legal harassment and to prevent the abuse of legal resources. *Res judicata* (matter already judged), also known as claim preclusion in both civil law and common law legal systems, is a case in which there has been a final judgment and is no longer subject to appeal.

Similarly, in an earlier case of *In re Spanier Marine,* 1983 AMC 2441 (E.D. La. 1983), it was held that a stay of state court proceedings against the ship master until resolution of the limitation proceeding was appropriate.

[214] 926 F.2d 484 (5th Cir. 1991), where a collision occurred between a fishing vessel and an unburied natural gas pipeline, causing an explosion that resulted in personal deaths and injuries. Lawsuits were filed in state court against the master of the fishing vessel. The shipowner petitioned limitation in federal district court and further sought to amend the restraining order seeking to restrain further prosecution against the master.

[215] 414 F. Supp. 131, 133 (N.D. Fla. 1975), it was held that pursuant to the terms of the Limitation Act, claimants did not need to seek a leave of the federal district court entertaining the limitation action in order to proceed with their separate action against master of the vessel. Such claims were entirely outside of the limitation proceeding.

[216] 167 F.3d 538 (5th Cir. 1998)

Indeed, neither Circuit should be criticized for its approach to interpreting and applying the Limitation Act. The fundamental problem lies with the wording of the Act itself that has an inconsistency between its language and its purpose. Actually the judicial use of restraining order to stay further proceedings against the master by the Ninth Circuit indicates a practical need to include master and crew within the limitation of liability regime so that the overall statutory purpose of limitation of liability would not be frustrated. This problem can only be resolved either by adopting the limitation Convention to substitute the Limitation Act, or amending the relevant sections (mainly Sections 185 and 187) of the Limitation Act and the corresponding procedural rules to include the stay of proceedings against the master and crew and extend the right to limitation virtually to master and crew.[217]

2.4 Liability Insurer

Liability insurers are another new type of persons that appear in the 1976 Convention. According to Article 1(6), the insurer is entitled to the benefits of limitation for claims subject to limitation to the same extent as the assured himself. Thus, where the assured may limit his liability, the insurer shall be entitled to the same limitation as the assured. Inclusion of insurers within parties entitled to the benefit of limitation is in accord with the modern justification for the limitation regime being based on insurance at reasonable cost. The 1957 Convention does not include insurers within protection of limitation of liability. The reason for extending the benefits of limitation to insurers is mainly to avoid the effects of emerging direct action statutes against insurers under which the insurer's liability may exceed that of his insured shipowner who is entitled to limit his liability. When liability insurers can be sued directly, the right to limitation becomes critical for them. The philosophy inherent in direct actions is that liability insurance is issued primarily for the benefit of the public rather than for the protection of the assured. The insurance proceeds must be secured for the victims, by way of direct action against the insurer or by other means, where the owner is insolvent.

In the United Kingdom, a direct action can be brought in certain circumstances by a third party against the insurer by virtue of the Third Parties (Rights Against Insurers) Act 1930.[218] Direct actions are especially favorable to claimants when the responsible assureds are found insolvent or unable to satisfy the claims and would up, since the unsatisfied claimant can "step into the shoes" of the assured and take over whatever rights the assured has against the insurer under the liability policy under the 1930 Act.

Following the terms of the 1976 Convention, Article 206 of the China Maritime Code provides that the insurers liable for maritime claims are entitled to limitation of liability to the same extent as the assured when the assured may limit his liability in accordance with the provisions of the Code.

The U.S. Limitation Act affords no right of limitation to insurers. Therefore, the insurers might be exposed to unlimited liability where claimants may directly sue the shipowner's insurers. Moreover, the procedural problem arises in cases involving

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[217] *Supra* note 76.

[218] A draft bill that intends to update the 1930 Act by improving the victim's rights and reducing litigation, expense and delay is in the process of being approved by Parliament. If the Bill passes, it is likely to lead to more claims being made against insurers.

direct actions and limitation proceedings because the direct action statute clashes with the concursus in federal limitation proceedings. It is difficult to reconcile conflicts between the two legal regimes. For instance, in *Maryland Casualty Co. v. Cushing,*[219] the court stayed the state direct action against the shipowner's insurers pending the outcome of the limitation proceeding in order to avoid collateral estoppel, *res judicata*, and depletion of the insurance coverage that would ensue from repetitive litigation. The procedural problem seemed to have been solved. However, the substantive question as to the standing of the insurer under the Limitation Act was left open because of the divided (4-4-1) opinion of the court.

Later, in the well-known case of *Olympic Towing Corp. v. Nebel Towing Inc. (Nebel Towing)*[220] that involved the same issue, it was held that the liability insurer could neither take advantage of a "no-action" clause in the insurance policy[221] nor of shipowners' statutory right to limitation. Insurers are not "owners" and cannot claim a statutory right to limit liability under the Limitation Act in their own right. Therefore, the insurer was liable above the limitation amount and up to the full amount of the insurance policy, regardless of the shipowner's successful limitation of liability. However, the decision of *Nebel Towing* was overruled in *Crown Zellerbach Corp. v. Ingram Industries, Inc. (Crown Zellerbach).*[222] The court distinguished the "no action" clause in *Nebel Towing* from the mere policy limit in *Crown Zellerbach* by observing that the policy limit was long embedded in the P&I rules and was not against public policy as in the case of "no action" clause. The court recognized that the statutory right to limitation was not conferred on the insurers; however, it granted the insurers the right to limit their liability to the shipowner's limitation amount in accordance with the terms and conditions (policy limit) of the insurance contract. The issue that splits these two cases is whether limitation of liability is a defense personal to the shipowner. The *Nebel Towing* court took the statutory right to limitation as merely a defense personal to shipowners that could not be invoked by insurers; while the *Crown Zellerbach* court rejected the personal defense argument in *Nebel Towing* and pointed out that the statutory right of limitation of liability should be granted as a matter of federal policy, but not a personal defense attached to status.

In practice, after the *Crown Zellerbach* decision, the so-called *Crown Zellerbach* clause has often been inserted into marine insurance policies. For example, in *Magnolia Marine Transport Co. v. LaPlace Towing Corp.*,[223] it was held that the maritime insurer's right to limit its liability is purely contractual, and stems from the terms of the insurance policy that contains a *Crown Zellerbach* clause. Thus, the insurers are entitled to protection as long as the insurance policy has useful language. The *Crown Zellerbach* language is fairly simple and can take any form as long as the same message is conveyed, i.e., the terms of the insurance policy limit maximum liability to the amount for which the shipowner/assured would be legally liable to pay upon successfully maintaining its right to limit its liability under the Limitation Act.

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[219] 347 U.S. 409. 74 S.Ct. 608, 98 L.Ed. 806, 1954 AMC 837 (1954)

[220] 419 F.2d 230, 1969 AMC 1571 (5th Cir. 1969), where the liability insurer was sued directly by the claimant under the Louisiana direct action statute.

[221] According to the court, the "no-action" clause became ineffective under the direct action statute since it was against the very public policy that was meant to be promoted by the direct action statute.

[222] 783 F.2d 1296, 1986 AMC 1471 (5th Cir. 1986).

[223] 964 F.2d 1571, 1994 AMC 303 (5th Cir. 1992); also in *Brister v. A.W.I., Inc.*,946 F.2d 350, (5th Cir. 1991), the insurer was held to be able to rely on the shipowner's limitation of liability pursuant to insurer's policy that contained a *Crown Zellerbach* clause.

In other words, to the extent an insured owner has a right to limit his liability, the amount the owner's insurer must pay under the policy is also limited, even where the policy is written for a greater amount.

Although the conclusion reached by the court in *Crown Zellerbach* is in favor of insurers, the reliance on the policy defense/statutory defense dichotomy has been criticized for having starting on the wrong foot. Indeed, the distinction between a statutory defense and a policy defense makes little difference in light of the direct action statute, which voids any terms in a policy which are against public policy.[224] So the conflict arising from the direct action statute and limitation of liability regime has not been solved entirely. As marine policies are written virtually under the assumption that limitation of liability will indirectly benefit the underwriters, perhaps the only satisfactory resolution of the limitation-direct action conflict is to amend the Limitation Act itself and confer standing to the insurer under the Limitation Act.

Given the insurers are afforded the right to limit to the same extent as the assured, another question arose, that is, whether in the direct action from the third party claimant the defendant insurer is entitled to rely upon the defenses of the policy or the Marine Insurance Act 1906[225] that he would have in the claim by the assured to restrict his liability. Such defenses available to the insurers could be deductibles, limits, conditions, exceptions in the policy terms, pay to be paid clause, requirements for compliance with rules of classification society and ISM Code, mandatory provisions such as Marine Insurance Act 1906, non-payment of premiums etc. If the insurer is deprived of his policy defenses in an action by a third party, he may have to meet the claim of the third party claimant in full in circumstances which would have allowed him to avoid a claim under the policy even if the assured has forfeited his right to limit liability. The 1976 Convention is drafted presumably with no such intention since the new limitation regime is based on the foundation of insurability. Therefore, it is only those limited rights that the assured has against the insurer under the liability policy which are to be transferred to the third party, regardless of the assured being fully liable to the third party.[226]

It may be argued that allowing the insurer to maintain in the third party action the policy defenses would be unfair to the third party claimant, since such are defenses concluded between the shipowner and the liability insurer and the innocent claimant could be deprived of compensation through a combination of the shipowner being either unidentifiable, inaccessible or insolvent and the liability insurer relying on the exclusion in its rules. Therefore, the claimants may require that the insurers cease to be an insurer and become a guarantor of funds. However, this would modify the indemnity nature of insurance policy since historically the relationship between a marine insurer and the assured has been strictly one of indemnification. Perhaps in the

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[224] See Gordon P. Gates, *Crown Zellerbach Dethrones Nebel Towing: Shipowner's Limitation of Liability is Available to Insurers*, 62 Tul. L. Rev. 615, 619 (1988).

[225] Most of the P&I Club Rules or insurance contracts made by the Clubs are subject to and incorporate this Marine Insurance Act or adopt similar provisions.

[226] E.g., in *The Fanti/The Padre Island*, [1990] 2 Lloyd's Rep. 191, it was held that a third party claimant stepping into the shoes of the assured under the 1930 Third Parties (Rights Against Insurers) Act and thereby taking over the assured's rights under a P&I policy could not recover from the P&I insurer under the Act unless and until the assured had complied with the P&I Club's Rules and first paid the claim. The third party claimant's rights under the Act were held to be restricted by the express provisions of the insurance cover.

long run, the claimant could either look for a certificate of financial responsibility possibly established in the future such as CLC/Fund, or alternatively, seek a letter of undertaking or a guarantee from the shipowner's P&I club.[227]

Conclusion

It is well understood that the party seeking to limit its liability must be sure that it has proper standing under the relevant limitation provisions. Originally, only the shipowners were entitled to limit their liabilities. The 1957 Limitation Convention extended the class of persons entitled to limit liability to the charterer, manager and operator of the ship, as well as master, crew and other servants. The 1976/1996 Convention has further extended the right to limitation to the salvor and liability insurer in consideration of the need to encourage salvage industry and the impact of insurance industry on limitation of liability.

The definition and scope of operators, managers and charterers are not specified in the limitation Conventions. It is universally acknowledged that both the 1957 and 1976 Conventions cover all types of charterers. A charterer's ability to limit is not governed by the question of status but by reference to the type of claim made against him. Slot charterers should be granted the right to limit as charterers.

As far as the domestic limitation legislations are concerned, the English law has adopted exactly the same wording as that of the 1976 Convention. While in China, the Maritime Code, modeled on the 1976 Limitation Convention, has granted the privilege of limitation to shipowners, operators, charterers, salvors, any person for whose act, negligence or default they are responsible, and liability insurers. However, manager is not included into persons entitled to limit as the international conventions did. It is submitted that manager should be added into the category of shipowner for purposes of limitation of liability when the Maritime Code is amended.

Under the U.S. limitation law, only owners or bareboat (demise) charterers are allowed to enjoy the right of limitation. The person seeking owner's status must exercise dominion over a vessel. Voyage and time charterers are expressly excluded from the protection of the limitation regime. Master and crew of the vessel, salvors and insurers are not covered by the limitation provisions, although in practice, the so-called *Crown Zellerbach* clause has often been inserted into marine insurance policies in an attempt to mitigate the conflict arising from the direct action statute and the limitation of liability regime. While the international maritime community has recognized more and more parties who should be entitled to limit liability, the U.S. law restricts limitation to owners and demise charterers only and does not protect some types of parties who have taken on roles similar to those of shipowners and contributed significantly to the operation of worldwide shipping industry. In light of the prevailing 1976/1996 Limitation Convention, the current U.S. limitation regime should be amended so that the benefit of limitation could be extended expressly to include all types of charterers, master and crew, salvors and insurers.

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[227] See C.W.H. Goldie, *Limitation of liability and insurance,* Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton

Chapter Three Claims Subject to Limitation

Introduction

As discussed in the previous chapter, only certain categories of persons (although being extended over the years) are within the protection of limitation, the same goes with the range of claims which qualify as limitable. Not all maritime claims are subject to global limitation of liability. Only those claims which are limitable under the Conventions or domestic laws are covered by the limitation regime. This Chapter will discuss the types of claims subject to global limitation and the manner with which they are dealt with under the Conventions and different jurisdictions.

Under both the 1957 and 1976 Limitation Conventions, the benefit of limitation is applied to claims arising from certain specified circumstances. Under the 1957 Convention, the limitation privilege was restricted to acts or omissions done by a person on board or in the navigation or management of the ship, or in the loading, carriage or discharge of its cargo, or in the embarkation, carriage or disembarkation of its passengers.[228]

Compared with the 1957 Convention, the scope of claims subject to limitation has been significantly extended by the 1976 Convention. That is, the specified claims include those in respect of loss of life or personal injury or loss of or damage to property on board or in direct connection with the operation of the ship or with salvage operations and consequential loss resulting therefrom; loss from delay in the carriage of goods or passengers; loss resulting from the infringement of non-contractual rights; wreck raising and removal; removal, destruction or rendering harmless of cargo; liabilities to third parties for measures taken to avert or minimize loss for which the party seeking to limit is liable.[229]

Moreover, under the 1976 Convention, limitation is now available in respect of claims "whatever the basis of liability may be … even if brought by way of recourse or for indemnity under a contract or otherwise", subject to certain exceptions.[230] The wording has introduced a significant change in the limitation law. Before the 1976 Convention, shipowners could only limit their liability for which the shipowner is liable in damages as opposed to liability for money due under a contract[231] or payable under a statute[232]. This wording clearly indicates that under the 1976 Convention shipowners are entitled to limitation in respect of the claims enumerated in Article 2 whether the liability arose in contract, tort, and strict liability or by statute, etc. The purpose of the Convention was to make some additional claims against shipowners (such as money due under a contract or payable under a statute) subject to limitation

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[228] See Article 1(1) of the 1957 Convention.

[229] See Article 2 of the 1976 Convention

[230] See the introductory paragraph of Article 2(1) and Article 2(2) of the 1976 Convention.

[231] See *The Kirknes*, [1956] 2 Lloyd's Rep. 651, where it was held that the indemnity claim under the towage contract was not subject to limitation

[232] See *The Stonedale No.1*, [1955] 2 Lloyd's Rep. 9.

and to ensure that the right to limit liability is almost indisputable.[233] As observed by the judge in *Caspian Basin v. Bouygues Offshore S.A. (No.4)*,[234] we must look at the nature of the claim rather than its legal basis, when determining whether the relevant claim falls within the scope of Article 2 of the 1976 Convention, as is confirmed by the wording in Article 2(1) "whatever the basis of the liability may be", and further reinforced by Article 2(2) which states in effect that a claim within Article 2(1) remains a claim entitled to limitation even if brought in the form of a claim to damages for breach of contract, or a claim to an indemnity.[235]

For instance, in *CMA CGM v. Classica*,[236] the charterer was entitled to limit his liability for the indemnity claims in respect of cargo liabilities brought by shipowners since it came within the words "loss of or damage to property … occurring …on board the ship" in Article 2(1)(a), even if it was being passed on *via* the shipowners. Similarly, in *The "Darfur"*[237], based on the decision of the Court of Appeal in *CMA CGM v. Classica*, indemnity in respect of cargo claims by time charterers against shipowners was also limitable.

In respect of domestic laws on claims subject to limitation, both the U.K. and Chinese limitation laws have adopted essentially the provisions as contained in the 1976 Convention, subject to certain reservations or omissions. Under the U.S. limitation regime, the language of the Limitation Act appears to be broad enough to encompass claims generally, however, in practice it is subject to the judicial restrictions.

There are various types of claims that are subject to limitation under the Conventions and domestic laws. Among them, claims for loss of life or personal injury and claims for loss of or damage to property are the major claims subject to limitation.

3.1 Property Claims and Personal Injury/Death Claims

Generally speaking, both property claims and personal injury or death claims, whether arising from tort or contract, are subject to limitation of liability under the international Conventions[238] and various domestic legal regimes around the world.

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[233] See *The Breydon Merchant*, [1992] 1 Lloyd's Rep. 373.

[234] [1997] 2 Lloyd's Rep. 507, where the barge became a total loss while under tow because the tow line parted in stormy conditions when the vessels were approaching Cape Town and the barge was driven ashore onto the rocks at Oude Schip.

[235] *Id.* p.522. The court further stated: Such an approach to the categorisation of claims for which limitation is available makes good sense, particularly in an international Convention. Different states will have differing legal principles: it would be undesirable if a claim necessarily pleaded in one way under one domestic legal system should fall within the Convention, when the identical claim necessarily pleaded in some other way under some other domestic legal system might fall outside the Convention. Nor would it make much sense if the self same loss or damage fell within or outside the Convention depending upon which of several possible causes of action or bases of liability was pleaded.

[236] [2003] 2 Lloyd's Rep. 50; [2004] 1 Lloyd's Rep. 460. The owners claimed against the time charterers for damages comprising the cost of repairing the vessel and salvage remuneration paid to salvors, together with an indemnity in respect of their exposure to cargo claims and general average contributions, which were attributable to the shipment of dangerous cargo by the charterers..

[237] [2004] 2 Lloyd's Rep. 469. The time charterer of *Darfur* claimed against the owners for damages for breach of charter party and/or breach of duty of care and various indemnity claims and expenses as a result of the collision and subsequent deviation.

[238] See Article 1 of the 1957 Convention and Article 2 of the 1976 Convention.

Although the fairness and justification of application of the limitation system to personal injury or death claims has been questioned, the reality is that these type of claims are generally subject to limitation in various jurisdictions. Personal injury/death claims, compared with property claims, have always enjoyed preferential treatment as far as the limitation fund is concerned.[239] This increases the chances for the victims to be adequately compensated.

Damage to harbor works, basins and waterways and aids to navigation are expressly subject to limitation under the 1957 Convention and the 1976 Convention, although the term "damage to property" under both Conventions may already be broad enough to include such damage to harbor works, etc.[240] However, whereas the 1957 Convention allowed Contracting States to reserve the right to exclude both wreck removal and damage to harbor works from its application of limitation benefit,[241] the 1976 Convention allows reservation only as to wreck removal. The specific mention of damage to harbor works, etc. is important because liabilities arising from claims for such damage are often governed by domestic legislation under various legal regimes. Under some domestic legislation, limitation is not allowed for such kind of claims. For instance, under the United States law, damages to harbor works of the national government such as locks and dams have been held not subject to limitation.[242]

In particular, it is worthy to note that the 1976 Convention has extended the claims subject to limitation by the wording of Article 2(1)(a) that the individual claims, whether property claims or personal injury or death claims, be occurring on board or in direct connection with the operation of the ship or with salvage operation. Adding the words "salvage operation" is apparently for the purpose of coordinating with the status of salvors who were included within protection of limitation of liability in the wake of *The Tojo Maru*. However, it is not an easy task to delineate the exact extent to which the right to limit has been extended by "in direct connection with the operation of the ship". It was observed by Mr. Rix J. in *Caspian Basin v. Bouygues Offshore S.A.*[243] that this wording is the way in which the Convention expresses the necessary linkage between loss of or damage to property on the one hand and the ship in respect of which the claim to limit is made on the other. Thus, the misrepresentation claim of the capacity of the tug is within the scope of Article 2(1)(a) of the 1976 Convention.

3.1.1 On Board or in Direct Connection with the Operation of the Ship

"On board" speaks for itself, therefore it is unnecessary to put further discussion. "Operation of the ship" should be given a broad construction. To confine the phrase to the narrow scope would significantly limit the protection that should be available in respect of claims that could reasonably be brought within the protection of

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[239] See Article 3 of the 1957 Convention, Article 6 of the 1976 Convention as well as Article 3 of the 1996 Protocol to the 1976 Convention. For more detailed discussion on the limits of liability, refer to Chapter 6 of this paper.

[240] See Article 1(1)© of the 1957 Convention and Article 2(1)(a) of the 1976 Convention.

[241] See Protocol of Signature of the 1957 Convention.

[242] See, e.g., Hines, Inc. v. United States, 551 F.2d 717, 1977 AMC 380 (6th Cir. 1977); United States v. Ohio Valley Co., 510 F.2d 1184, 1975 A.M.C. 1477 (7th Cir. 1975). See Chen Xia, *Limitation of Liability for Maritime Claims—A study of U.S. Law, Chinese Law and International Conventions*, Kluwer Law International, 2001, p. 34

[243] [1997] 2 Lloyd's Rep. 507, 522.

limitation of liability. Perhaps, the U.K. judiciary has offered some guidance in this respect. For instance, in *The Aegean Sea*,[244] it was observed that "operation of the ship" is not confined to action occurring on the ship; it encompasses all that goes to the operation of the ship, including the selection of a port and the ascertainment of its safety and suitability for the vessel and the provision of what might be necessary for the vessel to use it safely—charts, tugs and the like. Thus, loss of bunkers on board was a loss occurring in direct connection with the operation of the ship since it was in consequence of *Aegean Sea* being ordered to the unsafe port.

However, the loss or damage conceived here does not include loss or damage to the ship itself (which tonnage is used to calculate the limitation fund) claimed by the shipowners against the charterers. Firstly, loss of or damage to the ship itself could not be said to be loss or damage to property on board since property on board meant something on the ship and not the ship itself. Secondly, the loss of the very ship could not be regarded as "loss of property ...occurring in direct connection with the operation of the ship", because it is the operation of the very ship that caused the loss of property, the ship cannot be the object of the wrong; while the situation would be different if the claim is against salvors for the loss of the ship they are trying to salve, in that case the loss of the ship being salved occurs in direct connection with the operation of the salvor's ship.[245]

Furthermore, under the 1976 Convention, the aggregation of all claims against both owners and charterers are subject to one limit and to one fund.[246] It would be surprising if the limitation fund available for distribution established by the shipowners should be reduced by their claim against charterers for the loss of the ship. This would diminish what was available for the intended beneficiaries of the fund, such as cargo claimants and those whose property has been damaged by pollution. Therefore, the claims in respect of which an owner or a charterer can limit do not include claims for loss or damage to the ship relied on to calculate the limit.[247]

This point was further illustrated and confirmed in *CMA CGM v. Classica*, in which one of the issues was whether the claims by shipowners against charterers, particularly the claim for the damage to the vessel by reference to which a charterer sought to limit his liability was a claim which fell within Article 2(1)(a). The Court of

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[244] (1998) 2 Lloyd's Rep. 39, where the vessel and most of her cargo were lost and there was large-sale pollution of the environment and damage to private property due to grounding and subsequent explosion. The owners sought to recover the amounts for which claims were brought against them (recourse or indemnity claims in respect of salvage and pollution, liability to CRISTAL) together with the value of the vessel, the bunkers on board and the freight from voyage charterers for nomination of unsafe port.

[245] See *The Aegean Sea, Id*. As we have discussed in the previous chapter, a charterer's ability to limit would depend on the type of claim that was brought against him rather than the capacity in which he was acting when his liability was incurred.

[246] See Articles 9 to 11, particularly Article 11(3) of the 1976 Convention. All those persons falling within the category of "shipowner", i.e. owner, charterer, manager or operator, are brought together as a single unit for the constitution of a single limitation fund.

[247] Considering that charterers' right to limitation when sued by shipowners will be restricted under some occasions, it has been suggested that the charterers might, by analogy to that a claim by shipowners against managers could be limited by a term of the management contract, attempt to insert a contractual limitation in the charter party (or other contract), expressly limiting the liability against the shipowner; or they may insure against the increased exposure to possible unlimited liability for their own sake.

Appeal, in agreement with the conclusion reached in *The Aegean Sea* that loss of or damage to the vessel itself was neither loss or damage to property on board nor occurring in direct connection with the operation of the ship, further observed that the ordinary meaning of Article 2(1)(a) did not extend the right to limit to a claim for loss or damage to the vessel by reference to the tonnage of which limitation was to be calculated.[248] Accordingly the claim by the shipowners for the cost of repairing the ship as a result of damage caused by the charterers' breach of contract was not subject to limitation.

Consequential Loss

Claims for consequential losses are expressly allowed to qualify for limitation purposes under Article 2(1)(a) of the 1976 Convention, while its application may be restricted by the potential issue of causation and doctrine of remoteness of damage.[249] For instance, it has been submitted that claims for damages for psychiatric injuries may be subject to limitation where the claimant has witnessed a maritime disaster or its aftermath involving injury or death of a close relative, on the basis that it is a claim for "personal injury … occurring … in direct connection with the operation of the ship …" and is a "consequential loss resulting from …" such operation.[250]

Undoubtedly, if the personal death/injury or property damage is not occurring on board or in direct connection with the operation of the ship and hence not limitable, the consequential loss resulting therefrom is not limitable either. Thus, in *The Aegean Sea*, as the loss of the ship did not fall within Article 2(1)(a), the loss of freight consequent on the loss of the ship was not subject to limitation. Similarly, in *The Darfur,*[251] the issue for determination was whether the time charterer's claims against the shipowners in the limitation action were limitable pursuant to the 1976 Convention.[252] According to the description of the claims, it was clear that off-hire due to out of service of the vessel *Darfur* from deviation after collision was not limitable. And the remaining claims, such as reimbursement of advance payment, arising from the infringement of a contractual right and accordingly not qualified for limitation under Article 2(1)(c), were consequential loss arising from damage to the vessel *Darfur* and thus not limitable.

3.1.2 Under the Domestic Legislations

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[248] That ordinary meaning was confirmed by recourse to the 1957 Convention. Recourse can be had to supplementary means of interpretation to confirm the ordinary meaning or to determine the meaning when the ordinary meaning leaves the matter ambiguous or obscure or leads to a manifestly absurd or unreasonable result. The result of giving the words their ordinary meaning is not absurd or unreasonable, nor is there ambiguity or obscurity. See Article 31 and 32 of the 1969 Vienna Convention.

[249] E.g., in *The Fiji Gas*, although loss of earnings claimed by the crew was a direct result of the damage to the vessel and reasonably foreseeable, there was not sufficient relationship of proximity established.

[250] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p.16.

[251] [2004] 2 Lloyd's Rep. 469

[252] Their claims mainly included off-hire due to collision and deviation, reimbursement of advance payment, additional insurance due to deviation, transhipment, indemnity in respect of claims made by cargo interests, salvor's claim, arrangement for substitute vessel, loss of profit as well as other loss of substantial time dealing with the collision.

3.1.2.1 Under the U.K. Law

The U.K. government, while actively initiating and closely keeping up with the development of limitation Conventions, has long before granted the right to limitation in respect of both property claims and personal injury or death claims.[253] The current limitation Convention in force in the U.K. is the 1976 Convention, as amended by the 1996 Protocol; accordingly, claims for personal injury/death and property damage (including damage to harbor works, etc.), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom are subject to limitation.

3.1.2.2 Under the Chinese Law

Under the Chinese legal regime, claims for property loss or damage, whether based on torts or contracts, have always been subject to limitation of liability. However, prior to the enactment of the China Maritime Code, personal injury and death claims were not allowed limitation according to the Certain Regulations on Compensation for Maritime Accidents 1959 which governed global limitation of liability. The position has changed since the Maritime Code adopts the principles as embodied in the 1976 Convention; thus, claims arising from personal injury/death are subject to limitation of liability now. The rationale for the change is perhaps because the drafters of the Maritime Code were most concerned with conforming to the principles of the international convention regime in order to fill in the gap between the domestic legislation and international law.

Following the provisions of the 1976 Convention almost *verbatim*, Article 207(1) of the Maritime Code provides that claims for personal injury or death and property damage or loss, including damage to harbor works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential loss resulting therefrom are subject to limitation of liability no matter what the basis of liability may be.

Up to now, Chinese Maritime Courts have not entertained any limitation cases where the shipowners claim against the charterers for damages such as the loss of ship in *The CMA CGM*. It is assumed that Chinese courts will not give an interpretation much deviating from that by the U.K. courts. Probably when necessary, the issue will be clarified by the judicial directive from the Supreme Court.

3.1.2.3 Under the U.S. Law

Under the U.S. limitation regime, in respect of limitable claims, the express language of section 183(a) is apparently broad enough to generally encompass claims for any loss or damage to cargo, claims for loss, damage, injury caused by collision, and other losses arising from any "act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred".[254] And section 189 further extends the limitation privilege

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[253] The first limitation legislation of 1734 in the U.K. had been enacted mainly for the purposes of including property claims within limitation regime. The earliest provisions that explicitly granted the limitation privilege to both property and personal claims was found in the 1894 Merchant Shipping Act.

[254] See 46 U.S.C. 183(a).

to "any or all debts and liabilities". Therefore, the scope of claims subject to limitation, as set out in the statute, includes practically almost all liabilities arising during the maritime venture, provided that they are not incurred with the privity or knowledge of the owner.

However, the real scope of limitable claims is rather more restrictive than it appears in the statute, because in judicial practice, the US. Courts have developed the doctrine of personal contract to restrict the scope of claims subject to limitation. That is, if a contract is found as personal, claims arising therefrom are excluded from limitation.[255] This doctrine has been severely criticized for its ambiguity that has frequently caused confusion.[256]

The language of the Limitation Act should be broad enough to include claims for personal death and injury, as has been traditionally acknowledged by the U.S. jurisprudence. In addition, the 1936 Amendment to the Limitation Act that provided a supplemental fund for personal death/injury for each distinct occasion based on the vessel's tonnage[257] also effectively confirms the congressional intent to encompass all claims for death and injury, whether the claimants were passengers[258] or the seamen[259].

However, over the years the limitation fund provided in the Limitation Act for personal injury/death claims is still considered insufficient to grant protection to the victims; besides, individuals, unlike shipowners, are often not within the protection of insurance. Subsequent federal acts enacted by the congress are effective evidence of the growing concern for the victims. Accordingly there were some arguments whether these federal acts might have effectively preempted the Limitation Act. For example, in *In re East River Towing Co.*,[260] the issue was to determine whether limitation of liability was implicitly repealed by the Jones Act[261] which provides seamen with a means of recovery for personal injuries. It was held by the U.S. Supreme Court that the functions of the Jones Act and Limitation Act were different and that both were applicable in their respective roles, while the former Act was determined to govern the extent of the seamen's substantive rights and the measure of damages, the latter Act delineated the source and extent of his compensation. The Congress neither intended to give preference to seamen nor to repeal the limitation statute.

Similarly, it is established that another statute, the Death on the High Seas Act (DOHSA),[262] only created a new right of action, not a new fund in respect of the

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[255] Alternatively, the U.S. courts, in disfavour of the limitation regime, have focused on the issue of the owner's privity or knowledge concerning a particular condition of unseaworthiness that caused the loss to deny the right to limitation in tort cases.

[256] For more detailed discussion on personal contract doctrine, see Chapter 4 Claims Excluded from Limitation.

[257] This supplemental fund had been increased from $60 per ton to $420 per ton in personal injury/death claims by Section 183(b) of the Limitation Act.

[258] See *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889), where it was held that the Limitation Act applied to cases of personal injury and death as well as to loss of or damage to property.

[259] See, e.g., *Paladini v. Flink*, 26 F.2d 21, 24 (9th Cir. 1928), aff'd, 279 U.S. 59 (1929); *In re East River Towing Co.*, 266 U.S. 355 (1924).

[260] 266 U.S. 355 (1924).

[261] Originally enacted in 1920, codified into 46 U.S.C. 688.

[262] Originally enacted in 1920, codified into 46 U.S.C. 761-768.

shipowner's right to limitation.[263] However, the DOHSA preserves a cause of action granted by a foreign death statute against a shipowner. In accordance with the DOHSA, actions for wrongful death at sea arising under foreign laws may be brought and tried in the U.S. admiralty courts, but in such actions, no U.S. statute may be invoked to reduce the liability of the wrongdoer.[264] That is to say, claims for personal injury and death arising under a foreign death statute may not be limited in accordance with the U.S. Limitation Act.[265]

3.2 Delay in the Delivery of Cargo and Passengers

Article 2(1)(b) of the 1976 Convention extends the right to limitation to claims resulting from delay in the carriage by sea of cargo, passengers or their luggage; whereas the 1957 Convention does not contain a similar provision. For example, claims for financial loss due to market fluctuation arising from delay in delivery of some seasonal cargo is covered by this wording and thus subject to limitation. It has been observed that this provision seemed to be more apparent than real since a claim for recoverable financial loss due to delay would probably be well within the meaning of Article 1(1) of the 1957 Convention.[266]

The U.K. limitation law adopted Article 2(1)(b) of the 1976 Convention. Under the Chinese law, similar to the 1976 Convention, the Maritime Code provides for limitation of liability in claims with respect to loss resulting from delay in the carriage by sea of cargo, passengers or their luggage.[267] Under the U.S. legal regime, however, there is no comparable statutory language expressly providing for limitation in claims for loss arising from delay.

3.3 Infringement of Non-Contractual Rights

Article 2(1)(c) of the 1976 Convention extends the benefit of limitation to claims resulting from infringement of non-contractual rights occurring in direct connection with the operation of the ship or salvage operations. The 1957 Convention contains a similar provision in respect of claims for loss resulting from infringement of rights.[268] However, the wording of infringement of rights is not easy to interpret and apply since the circumstances in each particular case could be very complicated. It has been suggested that this provision will probably cover situations such as, damages occurred as a result of the vessel's blocking of the entrance to a harbor, or a sunken vessel's interference with the right to engage in off-shore exploration of minerals in an area

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[263] See Robert D. Bjork, Jr., *Shipowners' Limitation of Liability and Personal Injuries: A Need for Re-Evaluation*, 48 Tul. L. Rev. 376 (1974).

[264] 46 U.S.C. 764 provides: whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

[265] See, e.g., *The Silver Palm*, 79 F.2d 598 (9th Cir. 1935); *In re Liverpool, Brazil & River Plate Steam Navig. Co.*, 57 F.2d 176 (2d Cir. 1932); *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941); *The Vestris*, 53 F.2d 847 (S.D.N.Y. 1931)

[266] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p.17

[267] See Article 207(2) of China Maritime Code.

[268] See Article 1(1)(b) of the 1957 Convention.

under lease.[269] It might also include, e.g., the way leave or right of passage enjoyed by a railway company over a bridge spanning a river.[270] For instance, it was recognized by Lord Denning in *The Putbus*[271] that the blocking of a waterway is an infringement of rights, in which case a right to limit may also be available under Article 2(1)(c).

The purpose of Article 2(1)(c) was to provide for limitation where any rights other than contractual rights were infringed. Accordingly, in *The Aegean Sea*, the claims made by the owners against charterers under the voyage charter-party for loss of the freight was for infringement of contractual rights and thus not within the scope of Article 2(1)(c).

This provision can be found in the U.K. law since the 1976 Convention has been incorporated into the Merchant Shipping Act 1995. Under the Chinese law, the Maritime Code contains a similar provision with respect to limitation of liability in claims for loss resulting from infringement of rights other than contractual rights in direct connection with the operation of the ship or salvage operations.

Under the U.S. limitation law, the statute does not mention infringement of rights. However, jurisprudence did indicate that loss resulting from such infringement of rights might be subject to limitation of liability. For example, in *The City of Bangor*,[272] claims resulting from obstruction of a wharf because of the sinking of a vessel were held to be limitable.

3.4 Wreck Removal Expenses

As we know, a wreck might bring a threat to the safety of navigation and perhaps also to the marine environment within coastal waters. Laws under most states around the world impose mandatory removal by the wreck owners. The governments of coastal states are especially concerned with the law governing wreck removal because in case the owners of the wreck fail to take removal measures, they often have to effect the removal for their own interest and thereby incur the costs. Therefore the question arises whether the wreck removal costs, which in most cases are quite high, are subject to limitation. There is no consensus whether this type of claims should be subject to limitation of liability. Nevertheless, it appears that under wreck removal laws of many jurisdictions a government's wreck and cargo removal expenses are probably, for public policy considerations, not subject to limitation, although some may argue that governments are most capable of absorbing this type of loss.

In general, many countries follow similar principles to deal with the legal issues concerning wreck removal. That is, the wreck owner has the duty to notify the authority concerned and properly mark the wreck immediately after the incident. The

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[269] Harold K. Watson, *The 1976 IMCO Limitation Convention: A Comparative View*, 15 Houston Law Review 249, 265 (1978).

[270] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p.17

[271] [1969] 1 Lloyd's Rep. 253

[272] 13 F.Supp. 648 (D.Mass.1936); see also, e.g., *In re Pennsylvania R.R.*, 48 F.2d 559 (2d Cir.), cert. denied, 284 U.S. 640 (1931), where claims for damage to a boardwalk caused by derelict barges were held recoverable and limitable.

wreck owner also has the duty to remove the wreck within the specified period of time. Failure to perform such duties, or in case the wreck constitutes imminent menace to the navigation or environment, the government will take the removal measures and is entitled to recover the full amount of the removal expenses. Wreck removal expenses are usually covered by the P&I Club rules; and the majority of wreck removal operations are directly managed and financed by the club in which the wrecked ship is entered.

The 1957 Convention allows wreck removal to be subject to limitation.[273] However, the Protocol of Signature gives Contracting States the option to exclude wreck removal claims from limitation. A large majority of the parties to the Convention chose to do so. The 1976 Convention likewise permits limitation as to the removal costs of wreck and cargo in Article 2(1)(d)(e).[274] However, it also allows states to reserve the right to exclude those claims from limitation. Many states have exercised this right of reservation in this respect and thus avoided the application of limitation of liability in wreck removal claims.

According to the 1976 Convention, a shipowner may limit liability in respect of claims for the expenses of removal or destruction of wrecks and removal or destruction of cargo respectively except where the claims relate to any remuneration under a contract with the person liable.[275] The combination of the provisions appears to indicate that, despite the language of "whatever the basis of the liability" provided by Article 2(1) of the Convention, probably with respect to wreck removal claims, those based in torts or arising out of statutory requirements may be subject to limitation of liability; while those arising out of contractual relations may not. Thus, although a shipowner can limit in respect of a claim for wreck removal costs incurred by a third party such as a harbor authority under the Convention, he probably could not limit his liability for payment to his own contractor who is employed to engage in the wreck removal work.

3.4.1 Under the U.K. Law

The U.K. government has traditionally refused to extend the right of limitation to the owner of a wreck in respect of claims for wreck removal expenses brought by a harbor authority which had raised the wreck pursuant to its statutory powers.[276] Accordingly, although section 2(2)(a) of the Merchant Shipping Act 1958 incorporated Article 1(1)(c) of the 1957 Limitation Convention, which extends the right of limitation to "liability imposed by any law relating to the removal of wreck", it has never been given statutory effect in the United Kingdom because of the operation of section 2(5) of the 1958 Act.[277]

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[273] See Article 1(1)(c) of the 1957 Limitation Convention.

[274] According to Article 2(1)(d)(e), claims in respect of raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship; and claims in respect of removal, destruction or the rendering harmless of the cargo of the ship, are subject to limitation of liability.

[275] See Articles 2(1)(d)(e) and Article 2(2) of the 1976 Convention.

[276] See, e.g., *The Stonedale No. 1*, [1955] 2 Lloyd's Rep. 9.

[277] Section 2(5) of the Act provides that this particular provision of the 1957 Convention would not come into effect in the UK until such time as the Secretary of Sate might appoint by statutory instrument. No such time was ever appointed; as a result, the right to limit liability for wreck removal expenses incurred under statutory powers was never a part of the law of the UK under the 1958 Act.

Later although the 1976 Convention was given full force of law and incorporated *en bloc* into the U.K. domestic law, in keeping with its traditional public policy of unlimited liability for wreck removal expenses, the U.K. government has made a reservation as to wreck removal claims.[278] When initially adopting the 1976 Convention, the United Kingdom reserved the right to exclude the application of article 2(1)(d).[279] Later on the U.K. government ratified the 1996 Protocol and denounced the 1976 Convention on May 13, 2004; in accordance with article 18(1)(a) of the 1996 Protocol, it excludes the application of both Article 2(1)(d) and (e). There is apparently an overlap between Article 2(1)(d) in respect of wreck removal claims and 2(1)(e) in respect of cargo removal claims of the 1976 Convention, since the expression "anything that is or has been on board such ship" under Article 2(1)(d) could include "cargo of the ship" under Article 2(1)(e).[280] Exercise of reservation only with respect to Article 2(1)(d) by the U.K. government prior to ratification of the 1996 Protocol might cause conflict in construction of the provisions of the Convention. Now, it appears that the seeming conflict has been well settled by reservation of both Article 2(1)(d) and (e) when ratifying the 1996 Limitation Protocol. Consequently, in the UK a shipowner cannot limit in respect of wreck and cargo removal expenses.

It is worthy to note that the exclusion in section 2(5) of the 1958 Merchant Shipping Act merely restricted the right to limit to direct claims brought by harbor authorities under statutory powers. It did not extend to the indemnity claims in which the owner of a wreck sought to recover wreck removal expenses which it had paid to a harbor authority as damages from the owners of another ship at fault. This was confirmed by the House of Lords in *The Arabert*[281] that the owner of another ship at fault was entitled to limit his liability to the claim brought by the wreck owner, because the public policy considerations underpinning the exclusion in the 1958 Act were intended to protect the rights of harbor authorities and not the rights of other parties pursuing indemnity claims for such expenses.[282] In contrast, due to the introductory

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See Griggs & Williams, *Limitation of Liability for Maritime Claims,* 3rd. ed., London: L.L.P., 1998, p.18

[278] According to Merchant Shipping Act 1995, the right to limit in respect of wreck removal expenses would not apply until a fund is established by the Secretary of State. See Patrick Griggs, *Limitation of Liability for Maritime Claims: the Search for International Uniformity*, L.M.C.L.Q. 369, 375 (1997).

[279] The U.K. government excluded the application of article 2 (1)(e) with regard to Gibraltar only.

[280] The meaning of cargo under this provision is hard to define. Certainly, oil and nuclear materials (as well as possibly hazardous and noxious substances, for which Contracting States, such as the U.K, to the 1996 Protocol make reservation) as cargo are not within the meaning of cargo under this provision as they are excluded from the scope of limitation of liability by Articles 3(b)(c)(d) of the 1976 Convention.

[281] [1961] 1 Lloyd's Rep. 363

[282] As observed by the Judge Macrossan of the Australian Supreme Court in *The Tiruna*, [1987] 2 Lloyd's Rep., "when the innocent shipowner seeks to recover from the wrongdoer the expenses of wreck removal which he has been forced to pay at the behest of the harbour authority, he is making a claim arising from the loss of his ship and so the limitation applies. He is seeking to recover what is, in effect, just one more item of special damages flowing from the loss of his ship. On the other hand, at the earlier stage, when the harbour authority demands against the innocent shipowner removal of the wreck or seeks to recover the expense of removal, it is not making a claim arising from the loss of a ship (which would pre-eminently be a claim in tort) but is making a claim (a statutory demand in debt) simply arising out of an owner's failure to remove an obstruction which *de facto* exists. For this reason, which the innocent shipowner is not given protection against the harbour authority's demand, the

wording "whatever the basis of liability may be, even if brought by way of recourse or indemnity", the reservation corresponding to adopting the 1976 Convention appears to exclude all the various types of claims relating to wreck removal, whether statutory or indemnity claims.[283]

3.4.2 Under the Chinese Law

Under the China Maritime Code, claims for wreck removal expenses are not subject to limitation of liability. The Maritime Code virtually excludes the application of Articles 2(1)(d)(e) of the 1976 Limitation Convention for claims in respect of the raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and claims in respect of the removal, destruction or rendering harmless of the cargo of the ship, since the above provisions are not included within Article 207 (claims subject to limitation) of the Code.[284] To avoid any conflict that might arise in the construction of the relevant provisions, it is submitted to expressly exclude the wreck removal expenses in Article 208 (claims excluded from limitation) when the Maritime Code is amended.

Till now in China, there is no specific law governing wreck removal. However, relevant provisions can be found in various laws and administrative regulations which provide to the effect that the owner or operator shall have the obligation to remove the wreck and shall be held fully liable for the costs if the government authorities effect such removal operations.[285] These include Maritime Environmental Protection Law,[286] Maritime Traffic Safety Law,[287] Water Law,[288] Procedures for Control of Participation by Foreign Businesses in the Salvaging of Sunken Ships and Sunken Objects in China's Coastal Waters,[289] and the 1957 Measures of Management of Wreck Removal[290]. In addition, certain harbor rules have also laid down the measures to be observed in wreck removal cases.

The most complete regulations concerning wreck removal are the 1957 Measures of

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wrongdoing owner is permitted to limit his liability against the innocent owner's consequential claim for compensation against him". at p. 677-78.

[283] See Richard Williams, *Limitation of Liability: Wrecked on the rocks of legislative myopia?* 11 Journal of International Maritime Law 5, 6-7 (2005)

[284] With respect to the Hong Kong Special Administrative Region, it reserves the right in accordance with Article 18(1) of the 1976 Convention, to exclude the application of the Article 2(1)(d).

[285] Article 40 of the Maritime Traffic Safety Law of the People's Republic of China provides: With respect to sunken or drifting objects affecting the safety of maritime traffic, the conservation of the channels or constitution of a threat of explosion, the owners or operators thereof should salvage and remove such objects within the time limit set by the competent authorities. Failing that, the competent authority may compel the undertaking of salvage and removal thereof and their owners or operators shall bear all the expenses incurred. Nothing in this article shall prejudice any right of recourse of owners or operators of the sunken or drifting objects against third parties.

Other relevant laws and regulations contain similar provisions. For instance, according to Article 35 of the Maritime Environmental Protection Law, in case the wreck caused or may cause serious pollution damage due to marine casualty, the harbour superintendence is empowered to take compulsory measures to avoid or reduce such pollution damage.

[286] Effective as of March 1st, 1983, amended and effective as of April 1st, 2000

[287] Effective as of January 1st, 1984.

[288] Effective as of July 1st, 1988, amended and effective as of October 1st, 2002

[289] Promulgated and effective on July 12th, 1992 by the State Council.

[290] Promulgated and effective on Oct. 11th, 1957 by the Ministry of Transportation.

Management of Wreck Removal, promulgated by the Ministry of Transportation. The Measures apply to wrecks in the territorial seas as well as inland waterways. The competent government authorities, i.e., the Harbor Superintendents, are empowered to clear and remove a wreck when the public safety of navigation is highly endangered. The Harbor Superintendents are also empowered to provide the time limit for application and removal according to the circumstances; and if the wreck owner fails to apply for and make removal within the specified time limit, the authorities are empowered to take removal actions.

Nevertheless, the provisions of the 1957 Measures are rather general and not keeping pace with the development of wreck removal law in recent years. As a matter of fact, the authorities in charge of wreck removal are very often in an awkward situation since it is not an easy task to claim the incurred huge removal expenses. Besides, in practice, the wreck removal work is often authorized to companies specialized in salvage and removal, which are often reluctant to engage in removal operations due to insufficient provision of financial means. Jurisprudence has indicated that without effective law in force, the authorities can only look for other possibilities, such as waiting for opportunities to arrest a sister ship of the wreck or claiming for payment against the negligent non-owners in a collision.[291] However, it is not always so easy to handle. For instance, the claim against the negligent non-owners often came to failure, since according to the Maritime Traffic Safety Law and other pertinent regulations, the person liable for the wreck removal expenses shall be owners or operators of the wreck.[292][293]

Therefore, in China, for the purposes of protecting national interests, relieving governments of the financial burden for removal operations, and promoting efficient and timely removal as well as protecting navigation safety and marine environment, a specific legislation regulating wreck removal needs to be drafted soon. At present, the wreck removal expenses will remain outside the protection of limitation of liability for public policy considerations. Perhaps in the future, by reference to the Wreck Removal Convention, it will be established that the wreck owners be required to maintain insurance or other financial security such as a bank guarantee to cover the removal expenses. And the right of direct action against the insurers will be provided in wreck removal claims.[294]

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[291] Si, Yuzhuo, *Research on International Maritime Legislations and China Countermeasures*, Beijing: Law Press (2002), p. 428-430

[292] E.g., in *The Asia Hope*, http://www.ccmt.org.cn/, the vessel *Asia Hope* sank in the territorial waters of China due to a collision between the *Asia Hope* and the *Golden Yi*, with subsequent oil spills causing severe pollution to the coastal area. For the safety of navigation and prevention of further pollution, the Harbour Superintendence took compulsory removal measures against the *Asia Hope*. However, the wreck owners, based abroad, ignored the payment claim for wreck removal expenses. The Harbour Superintendence had to turn to the negligent shipowner of *Golden Yi* for the payment, which was denied due to lack of legal basis.

[293] According to Article 10 of the Wreck Removal Convention, the registered owner shall *be liable for* the costs of locating, marking and removing the wreck. The Convention makes it clear that the registered owners (including operators of state-owned vessels), and in the absence of registration, persons owning the ship at the time of the maritime casualty, are the person liable (See Article 1(8) of the Convention).

[294] In China, it is primarily the China Shipowners Mutual Assurance Association that covers risk of wreck removal expenses.

3.4.3 Under the U.S. Law

In the United States, currently claims for wreck removal expenses are not subject to limitation in accordance with the Rivers and Harbors Act of 1899 (commonly known as the Wreck Act).[295] However, there had been a change of attitude of the U.S. courts to the issue whether limitation was applicable to claims arising under the Wreck Act. Courts in the early times took the view that the right to limitation was to be construed broadly, basing their decisions on the congressional intent and policy in favor of shipowners. Accordingly, U.S. courts held that the government's claims for wreck removal expenses were limited by *in rem* actions to the salvaged value of the wreck and any cargo on board under the Wreck Act. Thus, the liability of wreck owners in *in rem* actions was harmonized with the limited liability based on the ship's value under the Limitation of Liability Act. Claims for wreck removal costs were subject to *de facto* limitation of liability. It was usually unnecessary to invoke the Limitation Act for wreck removal claims at that time as the wreck had been abandoned to the government under the Wreck Act.

However, over the years, the Supreme Court has overruled many cases that had become outdated due to policy changes. The landmark case that had effectively ousted any application of the Limitation of Liability Act in claims for wreck removal costs is *Wyandotte Transp. Co. v. United States*.[296] In that case, the U.S. Supreme Court held that under section 15 of the Wreck Act, the United States government could recover the full costs incurred for wreck removal from the shipowner whose negligence caused the sinking of the vessel in navigable channels imposing dangers or obstructions to the public waterways. The negligent shipowner of the wreck could not merely abandon their negligently sunk vessel without being held liable *in personam*.[297] The *Wyandotte* decision appeared to have split the seemingly harmonious arrangement of statutory protection for shipowners provided by the Limitation of Liability Act and the Wreck Act. Thereafter, other similar cases were decided by relying heavily on the policy considerations adopted in the *Wyandotte* decision.

Following the *Wyandotte* decision, it has been generally acknowledged that the Limitation Act is inapplicable to all claims for recovery of wreck removal costs. That is, the Limitation Act did not limit liability arising under the Wreck Act. For instance, in *Hines, Inc. v. United States*,[298] the court held that the United States government's claim for damages and penalties pursuant to the Wreck Act was not subject to limitation.[299]

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[295] 33 U.S.C. 403-415. See generally Arthur J. Blank, Jr., *Wreck Removal; Statutory Restrictions; Rivers and Harbors Act,* 53 Tul. L. Rev. 1299 (1979).

[296] 389 U.S. 191, 1967 AMC 2553 (1967)

[297] *Wyandotte* suggested further that the owner's personal duty applied to the obligation to remove a sunken wreck as well as to the obligation to mark it. See also *In re Pacific Far East Line, Inc.*, 314 F.Supp. 1339 (N.D.Cal. 1970), aff'd, 472 F.2d 1382 (9th Cir. 1973), where the limitation proceeding was held ousted by implication due to the application of the *in personam* action under the Wreck Act.

[298] 551 F.2d 717, 1977 AMC 380 (6th Cir. 1977).

[299] See also *United States v. Ohio Valley Co.*, 510 F.2d 1184 (7th Cir. 1975); *United States v. Blaha*, 1989 AMC 642 (W.D.N.Y. 1989), where it was held that the defendant who knowingly purchased the wreck for one dollar was not entitled to limit his liability against the government's claims for raising the wreck under the Wreck Act.

In the wake of *Wyandotte*, some courts have held that the Limitation Act is not applicable where a shipowner' s vessel sinks as a result of negligence even though the negligence was without the owner's privity or knowledge.[300] The courts have developed a line of reasoning that the owner's statutory duty to remove the wreck came within the shipowner's privity and knowledge as a matter of law once he was aware that his sunken vessel was obstructing navigation. Other courts quickly adopted this practice of finding privity and knowledge based upon breach of the statutory duty to remove, to deprive of the shipowner's right to limitation.[301]

It is worthy of noting that U.S. courts generally held that negligent non-owners in wreck removal claims may not limit their liability as to the expenses for removing another vessel consequent upon their negligence. For instance, in *Western Transp. Co. v. Pac-Mar Service, Inc.*,[302] it was held that the innocent owner was entitled to fully recover the removal costs where he removed the barge sunk by a third party. Similarly, in *University of Texas Medical Branch v. United States*,[303] the negligent non-owner contended that since he was not the owner of the wreck, he did not have a statutory duty to remove the wreck. As such, failure to exercise such a duty could not be held within his privity or knowledge. However, the court observed that by negligently causing the sinking of the vessel, the negligent non-owner had violated the Wreck Act and thereby was fully liable for the wreck removal expenses incurred by the government's removal operation. Besides, public policy certainly would oppose limitation of liability in such circumstances.

3.4.4 Wreck Removal Convention

It is obvious that the provisions of the Limitation Convention which include wreck removal claims within the limitation regime are not so successful, since many countries have excised the right of reservation to exclude such claims from the protection of limitation. As a result, the shipowners probably have to face the financial burden including the loss of the vessel and unlimited liability for huge wreck removal expenses.[304] Considering the preponderant concern over wreck removal and the changing patterns of shipping, especially the emergence of the one-ship company, the International Maritime Organization (IMO) adopted the Nairobi International Convention on the Removal of Wrecks on May 18th, 2007 (Wreck Removal Convention). This Convention is intended to introduce a harmonizing international instrument to unify the rules governing the rights and obligations of States and

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[300] *See, e.g., In re Chinese Maritime Trust, Ltd.*, 361 F. Supp.1175 (S.D.N.Y. 1972), aff'd, 478 F.2d 1357 (2d Cir. 1973), cert. denied, 414 U.S. 1143 (1974), where the owner was denied limitation for the removal costs of the vessel which negligently sank in the Panama Canal.

[301] See, e.g., *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1339 (N.D. Cal. 1970), aff'd, 473 F.2d 1382 (9th Cir. 1973); *Hebert v. Exxon Corp.*, 659 F.Supp. 130 (E.D.La. 1987), where the shipowner was deprived of the right to limiting his liability for damages resulting from his failure to comply with the obligations under the Wreck Act

[302] 547 F.2d 97 (9th Cir. 1976).

[303] 557 F.2d 438 (5th Cir. 1977), cert. denied, 439 U.S. 820, 1979 AMC 2019 (1978).

[304] The right of the coastal state to intervene on the high seas to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from marine oil pollution or threat of such pollution following upon a marine casualty, is recognized by the 1969 International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention Convention, enter into force on 6 May 1975). However, the rights conferred by that convention arise only in the case of "grave and imminent danger" and it provides no mechanism for the recovery by the coastal state of the costs involved from the shipowner in question.

shipowners arising from wreck removal.[305]

This Wreck Removal Convention provides the legal basis for coastal States to remove from their coastlines wrecks and drifting or sunken cargo that may pose a hazard to the safety of navigation and/or to the marine and coastal environments depending on the location of the wreck or the nature of the cargo. It will fill in a gap in the existing international legal framework by providing the first set of uniform international rules aimed at ensuring the prompt and effective removal of wrecks located beyond the territorial sea. The Wreck Removal Convention, together with other Conventions already in existence, will give more comfort to a state which has been requested for a place of refuge for a ship in distress.

The Convention grants rights to the affected coastal states to remove a wreck from its Exclusive Economic Zone (EEZ)[306] if it poses a hazard to safe navigation or to the marine environment, and imposes strict liability on the shipowner for reporting, locating, marking and removing a hazardous wreck. The Convention also requires shipowners to take out insurance or provide other financial security to cover the costs of wreck removal and provides direct action against insurers for such costs, in most cases the P&I Club.[307]

In addition, the Convention includes an "opt-in clause" enabling a State Party to extend the application of the convention to wrecks within its territory, including the territorial sea.[308] There was dissension during the drafting stage as to whether to extend the scope of the new Convention to the territorial sea of States Parties. Those in favor of a universal wreck removal law covering both territorial and extra-territorial waters, mainly consider that the domestic regimes for wreck removal within territorial waters may have so many similarities that it would be possible to include these areas within the scope of the Convention. Besides, the majority of wreck removal cases will relate to wrecks within the territorial sea, it would be important to maintain

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[305] The Wreck Removal Convention 2007 will enter into force after being ratified by 10 states. The evolution of the Wreck Removal Convention started with the wreck of the tanker *Torrey Cannon* in March 1967, where serious questions arose as to the right of a coastal state to take action to protect its coastline from drifting oil leaking from a wreck. This disaster resulted in the adoption of the CLC/Fund convention, as well as the 1969 Intervention Convention. Later, the United Nations Convention on the Law of the Sea was adopted in 1982 and came into force on 16 November 1994. It created a new sea area called the exclusive economic zone (EEZ) which extends 200 miles from the base lines from which the territorial sea is calculated. The need for an international instrument was demonstrated by the problems surrounding the wreck of the French vessel *Mont Louis* which sank off the Belgian port of Zeebrugge following a collision with the passenger ferry *Olau Britannia* in August 1984. This casualty revealed the absence of a legal right for a coastal state to institute outside its territorial limits legal measures to protect access to a major port. For the history of the Wreck Removal Convention, see the paper by Patrick Griggs presented to the CMI Colloquium in Dubrovnik in May 2007 before the Nairobi Conference. Please visit http://www.comitemaritime.org/year/2005_6/pdffiles/YBK05_06.pdf.

[306] As defined by Arts 55-75 of the United Nations Convention on the Law of the Sea 1982.

[307] The provisions regarding compulsory insurance or other financial security are very similar to the comparable provisions in the CLC, HNS and Bunkers Conventions. There is a relatively low threshold of 300 tons for the required certificate. Consequently, this will increase the administrative burden on shipowners and their flag administrations, which will be required to provide the appropriate certification to small ships such as coasters and trawlers.

[308] See Article 3(2)&(3) of the Convention.

widespread international unification of the rules governing such wreck.[309] Arguments against extending the Convention to territorial sea are mainly concerned with the sovereignty of the States and prefer to leave the issue to the respective domestic law. However, the indisputable fact that most troublesome wrecks lie in shallow waters, and that most such wrecks are in internal waters and the territorial sea, led the Diplomatic Conference to adopt finally a text which gave state parties the option to extend the convention's provisions to such waters.

If a coastal state chooses to extend the Convention to its internal and territorial waters, it will relieve its concerns that it may be left with a valueless wreck and little prospect of recovering the costs from its owners, especially if the ship is owned by a one-ship company with no other assets.[310] Besides, it will promote international harmonization of national law governing wreck removal.

It should be noted that Article 10(2) of the Wreck Removal Convention expressly preserves the right of the registered owner to limit his liability by reference to any applicable national or international regime, such as the 1976 Limitation Convention, as amended. However, as discussed above, many states parties to the 1976 Limitation Convention have exercised the right of reservation in relation to wreck removal expenses with a result that shipowners are unable to limit in respect of wreck removal claims.

Furthermore, Article 12(1) of the Convention provides that the amount of insurance or other security required shall be the limit of liability of the ship calculated in accordance with Article 6(1)(b) of the 1976 Limitation Convention as amended by the 1996 Protocol. This is intended to ensure that the security and the liability of the insurer would not exceed that limit even if the ship were wrecked in a state which has not ratified the amended 1976 Limitation Convention, or which has excluded wreck removal claims from the scope of limitation of liability. As a result, even though the registered owner cannot limit in respect of wreck removal expenses, his obligation under the Wreck Removal Convention will be to carry liability insurance only up to the amount of the limit.

3.5 Measures Taken to Minimize Loss

According to Article 2(1)(f) of the 1976 Limitation Convention, measures taken to minimize loss are subject to limitation. No similar provision was included in the 1957 Limitation Convention. However, the scope of this provision is largely limited by various restrictions. The right to limit arises solely in relation to a claim made against the person liable who is entitled to limitation, such as a shipowner, to recover the costs of measures taken by a third party to prevent or minimize a loss, and further loss caused by such measures. Furthermore, such a claim is not subject to limitation if it relates to remuneration under a contract with the person liable according to the rider in Article 2(2). This rider is intended to the effect that the person liable cannot limit liability for contractual claims for remuneration in respect of measures taken by a

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[309] See the report of the Legal Committee of the 74th Session (October 1996). A universal wreck removal law was recommended to cover both territorial waters and the EEZ – with an opt out for territorial waters, i.e. permit a state party to exempt such waters from its application.

[310] See generally, Richard Shaw, *The Nairobi Wreck Removal Convention*, 13 Journal of International Maritime Law 429 (2007)

third party (e.g. contractor) to avert or minimize the loss, and further loss caused by such measures.

It should be noted that claims for costs to avert or minimize loss or further loss should be distinguished from those direct claims for salvage payment or general average contribution, which are excluded from the limitation regime according to Article 3(a) of the 1976 Convention. For instance, in *The Breydon Merchant*,[311] the claim of cargo owners against shipowners for sums paid to salvors for services rendered in the saving of the cargo fell well within the scope of Article 2(1)(f) since it was a claim brought by a person other than the person liable (the shipowners) and was in respect of measures taken to minimize loss (damage to cargo) for which the shipowners may limit their liability.[312]

Both the U.K. and Chinese limitation laws[313] have adopted this provision of the 1976 Convention to allow claims brought by persons (other than those liable but entitled to limitation) who take measures to avert or minimize loss or damage within limitation of liability.

Conclusion

It is well recognized by limitation Conventions and various domestic laws that only certain types of claims are subject to global limitation of liability. Claims for property damage and claims for personal injury or death are generally covered by the limitation regime of conventions and different jurisdictions around the world.

Compared with the 1957 Limitation Convention, the 1976 Limitation Convention has apparently extended the scope of limitable claims to a greater extent by adopting more extensive and inclusive wording such as "in direct connection with the operation of the ship", "whatever the basis of liability may be" etc.

With regard to domestic legislations, both the U.K. and Chinese limitation laws have adopted essentially the same provisions as contained in the 1976 Convention, subject to certain reservations or omissions. Under the U.S. limitation regime, the language of the limitation statute seems to be broad enough to include claims generally; however, in judicial practice the real scope of limitable claims is subject to more restrictions.

There is no unanimous agreement whether claims for wreck removal expenses should be subject to limitation of liability. The limitation Conventions allow the states to make reservations in this respect. It appears that under wreck removal laws of many jurisdictions, such claims probably are not subject to limitation for public policy reasons. Laws of the U.K., China and the U.S. all deny extending the right of limitation to the wreck owner in respect of claims for wreck removal expenses. Considering the threat posed by a wreck to the navigation and marine environment, the IMO has adopted the Wreck Removal Convention in 2007, which will provide the legal basis for coastal states to take wreck removal measures.

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[311] [1992] 1 Lloyd's Rep. 373.

[312] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P. (1998), p.19.

[313] See Article 207(4) of the China Maritime Code.

Chapter Four Claims Excluded from Limitation

Introduction

As indicated in Chapter Three, not all maritime claims are subject to global limitation of liability. There are certain types of claims explicitly excepted from limitation by Conventions or various domestic legislations as well as through case law. This Chapter will focus on the discussion of the types of claims excluded from the limitation privilege under the Conventions and domestic legislations as well as case law.

Both the 1957 and 1976 Limitation Conventions have provided certain types of claims that are excepted from the benefit of limitation. Under the 1957 Convention, claims for salvage or general average contribution and claims arising from contract of service are excluded. Whereas under the 1976 Convention, the scope of claims excluded from limitation has been further extended. As such, claims for oil pollution damage and nuclear damage are also excluded primarily due to the establishment of special and separate liability and limitation regimes for those types of claims.

In respect of domestic laws on claims excluded from limitation, both the U.K. and Chinese limitation laws have adopted virtually the same provisions as found in the 1976/1996 Convention. Under the U.S. limitation regime, case law has played a highly important role in interpreting claims excluded from the protection of limitation.

4.1 Claims for Salvage and General Average Contribution

4.1.1 Under the Conventions, the U.K. Law and Chinese Law

Claims for salvage and general average contribution are usually not subject to limitation under various limitation regimes around the world. Both the 1957 Convention and the 1976 Convention contain provisions excluding the same from limitation of liability.[314] The same provision is found in the U.K. limitation law which has incorporated the 1976 Convention, as amended by the 1996 Protocol. While in China, the China Maritime Code follows the same formula of the 1976 Convention with respect to claims excluded from limitation and hence excludes claims for salvage payment and general average contributions from the scope of limitation of liability by Article 208(1).

The major underlying reason for such exclusion is that those claims are already by their nature self-limited. Under the marine salvage law, salvage rewards are limited to the salved value.[315] In addition, to put a limit on the amount of the salvage would be against the public policy to encourage salvors to assist persons and property in danger at sea. Similarly, since claims for general average contributions are limited to the

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[314] See Article 1(4)(a) of the 1957 Convention and Article 3(a) of the 1976 Convention.

[315] For general discussion on marine salvage, see Geoffrey Brice, *Maritime Law of Salvage*, London: Sweet & Maxwell Ltd., 4th ed., 2003.

value of the property salved through the general average acts, i.e., general average sacrifice or general average expenditure, it is unnecessary to apply the additional global limitation; besides, if the shipowners are granted the right to limitation for general average contribution, it would be unfair for the cargo owners who likewise contribute general average but are not afforded the limitation privilege.[316]

As we know, the International Convention on Salvage 1989 has introduced in Article 14 the concept of special compensation to supplement the traditional principle of "no cure, no pay" in maritime salvage for salvage operation which protects the environment. As such, even if salvors failed to achieve any success in preventing or minimizing damage to the environment, they are entitled to special compensation with an amount equivalent to their expenses from the owner of the salved vessel. This special compensation should be in essence regarded as a payment for salvage under Article 3 in respect of which no right of limitation should be allowed. Accordingly, this special compensation is specifically named and excluded from limitation by the 1996 Protocol to the 1976 Convention.[317] In the U.K., the 1995 Merchant Shipping Act already gives effect to such exclusion. While in China, as China has ratified the 1989 Salvage Convention, the special compensation is thereby explicitly excluded from the limitation by the provision of Article 208(1) of the Maritime Code which specifically refers to salvage payment instead of salvage reward in the original 1976 Convention.

It is noteworthy that this exclusion solely excludes the right to limit in respect of a direct claim for salvage by a salvor against the owner of salved property or a direct claim for general average contribution by a party who has incurred a general average sacrifice or expenditure. Therefore, if a cargo interest, after paying his portion of salvage or general average contribution, seeks to recover such portion or contribution back from the shipowner for damages for breach of contract of carriage, the shipowner may have the right to limit his liability. This has been confirmed by Mr. Justice Sheen in *The Breydon Merchant*[318], where it was held that the cargo owners were making a claim for damages for breach of contract instead of a claim for salvage against the shipowners. The amount of their damages would be the sum required to compensate them for the loss or damage which they had suffered by reason of the breach and to restore the cargo owners to the position they would have been in if the shipowners had not broken their contract. One element in the assessment of the damages would be the amount for which the cargo owners were liable to the salvors. Therefore, the claim was determined as subject to limitation as it fell within the provisions of Article 2 of the Convention.[319] Similarly, in collision

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[316] See generally, D.J. Wilson, *The Law of General Average and the York-Antwerp Rules*, London: Sweet & Maxwell Ltd., 12th ed., 1997.

[317] The relevant provision states that "claims for salvage, including, if applicable, any claim for special compensation under article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average".

[318] [1992] 1 Lloyd's Rep 373, where due to serious fire in the engine room and subsequent salvage, cargo owners claimed against the shipowners for damages for breach of the contract of carriage, including their due proportion of the salvage reward that the cargo owners were obliged to pay the salvors.

[319] See also *The Darfur,* [2004] 2 Lloyd's Rep. 469. However, it seems that the French court took the contrary view. In *The Heidberg,* [1991] Lloyd's List (29 June), it was concluded by the Court of Appeal in Bordeaux that cargo owner's claims for indemnity against potential salvage and general average payments were excluded from the Convention by Article 3 as being claims for salvage and

cases, if the shipowner of one vessel, after paying the salvage reward, seeks to recover the same from the other vessel, the indemnity claim is not excluded from limitation since it is not a direct claim by the salvors for salvage. Such a claim could be reasonably classified into the claims subject to limitation such as Article 2(1)(a) (property loss or damage) or Article 2(1)(f) (measures taken to avert or minimize loss). Thus, the shipowner of the other vessel is entitled to the right to limitation.[320]

Nevertheless, even if the claim falls outside those excluded from limitation, it does not as a matter of course carry the right to limit. The person liable, for limitation purposes, still has to establish that such claim is subject to limitation under one of the specific provisions on limitable claims, e.g., Article 2 of the 1976 Convention. Thus, in *The Aegean Sea*[321], the claim by the shipowner against the charterers for an indemnity in respect of the salvage payment paid to the salvors was in a material part in respect of cargo instead of the loss of or damage to the ship which was not itself within Article 2(1)(a).[322] Therefore, it could properly be characterized as a consequential loss resulting from the loss of cargo and hence subject to limitation under Article 2(1)(a).

On the contrary, in *CMA CGM v. Classica*[323], it appears that since the shipowners' claim against the charterers to recover the amount paid to salve the ship due to the charterer's breach of contract was a claim for consequential loss resulting from the damage to the relevant ship itself which was not subject to limitation under Article 2, the claim fell outside the scope of Article 2. Accordingly, the charterers could not limit liability in respect of this particular claim from the owners. The same principle applied to the shipowners' indemnity claim against their liability for general average contribution in this case. Any contribution made by the shipowners would be made as a result of the damage to the vessel and therefore did not fall within Article 2.

4.1.2 Under the U.S. Law

Contrary to the Conventions, under the U.S. limitation law, salvage claims may be subject to limitation of liability. However, it seems U.S. jurisprudence has indicated that the availability of limitation of liability depends upon the type of salvage involved. Generally speaking, claims arising out of voluntary salvage are subject to limitation of liability.[324] In contrast, salvage claims arising out of contractual salvage would be denied limitation, since such claims could be treated as arising from a personal contract where according to the doctrine of personal contracts, claims arising out of breach of the contracts (herein failure to pay salvage) binding on parties

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general average respectively. As a result, the Court refused to lift the arrest of a vessel where a limitation fund had been constituted in accordance with the provisions of the Convention.

[320] See, e.g., *The Mintai No. 5 v. The Guangji*, (1999) Guangzhou Maritime Court, where salvage was engaged by the vessel *Mintai No.5* after it collided with the vessel *Guangji* with the result that substantial damage occurred to the vessel and cargo on board.

[321] [1998] 2 Lloyd's Rep. 39.

[322] For discussion of the issue that loss of or damage to the very ship itself is not subject to limitation, please refer to Chapter 3 on claims subject to limitation.

[323] [2004] 1 Lloyd's Rep. 460.

[324] See *The San Pedro*, 233 U.S. 365 (1912); *Metropolitan Redwood Lumber Co. v. Doe*, 233 U.S. 365 (1912); *The Ice King*, 256 F. 895 (S.D.N.Y. 1916), rev'd, 261 F. 897 (2d Cir. 1919).

personally are not subject to limitation of liability.[325] Nevertheless, in the U.S. it seems no case has specifically addressed the issue of the distinction between contract salvage and voluntary salvage for the purposes of determining whether the right to limitation is available. As a matter of fact, it is sometimes difficult to differentiate the two types of salvage in practice.[326] Since contract salvage is commonly used nowadays in salvage practice, it is assumed that under the U.S. law, claim for salvage is in most cases excluded from limitation of liability.

With regard to claims for contribution in general average, it seems that traditionally such claims are not subject to limitation of liability under the Limitation Act.[327] The reason was probably because the impartial and beneficial general average acts on the part of the shipowners should be encouraged and the general average acts are of voluntary nature rather than a personal contract between the parties.[328]

Concerning the claims excluded from limitation, there are certain types of claims covered by special limitation regimes other than the global limitation of liability, such as those arising from oil pollution damage, damage by hazardous and noxious substances, and nuclear damage etc. These special regimes have nowadays received more and more public attention due to their special character and immense adverse impact on the environment. In the last 20 years there have been dramatic developments in the international regime for liability and compensation for pollution damage.

4.2 Claims for Pollution Damage

4.2.1 Oil Pollution Claims

The most notable exception to global limitation is found in the liability regime for oil pollution claims. Numerous efforts have been taken to deal with the many aspects of the risks such as substantial clean-up expenses caused by oil pollution, as has been revealed by both international conventions and various domestic laws. The most significant of all is the International Convention on Civil Liability for Oil Pollution Damage 1969 (1969 CLC Convention)[329] which, in the wake of the disasters from oil spills in the last century, especially after the *Torrey Canyon* disaster,[330] has introduced a special regime to govern the liability of tanker owners to pay compensation for oil spills. As far as global limitation of liability is concerned, the 1957 Limitation Convention does not specifically mention pollution claims, and it might be assumed that they would be subject to limitation under the general wording of Article 1. While the 1976 Limitation Convention, in coordination with the 1969 CLC Convention,

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[325] See, e.g., *Great Lakes Towing Co. v. Mills Transp. Co.*, 155 F. 11 (6th Cir. 1907); *The Loyal*, 198 F. 591 (S.D.N.Y. 1912), aff'd, 204 F. 930 (2d Cir. 1913). For further discussion of personal contract doctrine, please refer to Section 4 of this Chapter.

[326] Rae M. Crowe, *Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine*, 53 Tul. L. Rev. 1087, 1102-1103 (1979).

[327] See e.g., *The Rapid Transit*, 52 F. 320 (D.C. Wash., 1892); *The Roanoke*, 46 F. 297 (E.D. Wis., 1891), aff'd, 59 F. 161 (7th Cir. 1893).

[328] Rae M. Crowe, *Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine*, 53 Tul. L. Rev. 1087, 1115-1116 (1979).

[329] The Convention entered into force on 19 June 1975, and is being replaced by its 1992 Protocol as amended in 2000.

[330] [1969] 2 Lloyd's Rep. 591

[illegible]

expressly excludes claims for oil pollution damage within the meaning of the 1969 Civil Liability Convention and its amendments or Protocols in force from global limitation, so as to avoid the overlap in respect of provisions on limitation of liability.

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The 1969 CLC Convention has attracted enormous support and proves to be successful because victims of pollution are often governments, and the 1969 CLC allows governments as well as private claimants substantial compensation without the necessity for major government expenditure in establishing systems for monitoring movements of persistent oils in bulk. Accordingly, subsequent liability and compensation conventions governing certain substances, such as hazardous and noxious substances, are largely drafted on the model of the 1969 CLC Convention.

4.2.1.1 Civil Liability Convention 1969/1992 and Fund Convention 1971/1992

The 1969 Civil Liability Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil tankers. The Convention embodies three main features, that is, strict liability (i.e. regardless of fault), a right to limit liability to a tonnage-related amount dedicated to pollution claims, and a system of compulsory insurance or other financial security designed to ensure that proper claims would duly be paid. The Convention covers pollution damage resulting from spills of persistent oils suffered in the territory (including the territorial sea) of a State Party to the Convention. It is applicable to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers. Spills from tankers during ballast voyage or bunker spills from ships other than tankers are not covered, nor is it possible to recover costs when preventive measures are so successful that no actual spill occurs, i.e., the Convention does not apply to threat removal measures. The shipowner cannot limit liability if the incident occurred as a result of the owner's personal fault ('actual fault or privity').

What non-persistent oil?

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CLC is the first half of a two-tier system in which supplemental compensation is also available under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971(1971 Fund Convention),[331] which main function is to pay compensation for pollution claims in cases where adequate compensation cannot be obtained from the owner of the ship under the 1969 CLC Convention - normally because the claims exceed his liability limit.[332] Unlike the CLC Convention, which puts the onus on the shipowner, the Fund is financed by contributions levied on oil importers in member states. The idea is that if an accident at sea results in pollution damage which exceeds the compensation available under the CLC Convention, the Fund will be available to pay an additional amount. The regime established by the two conventions ensures that the burden of compensation is spread more evenly between shipowner and cargo interests.

With the time going on, since the compensation available under the above two conventions would not be sufficient in major pollution incidents, both conventions were substantially amended in 1984 by the adoption of two protocols, neither of

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[331] This Convention entered into force on 16 October, 1978.

[332] In accordance with article 2 of the Protocol of 2000 to the 1971 Fund Convention, the 1971 Fund Convention ceased to be in force on 24 May 2002, when the number of Contracting States to the Convention fell to 24. The Convention therefore ceased to be in force for all States Parties thereto on that date and will not apply to incidents occurring after that date.

which has entered into force.[333] In 1992, two further protocols to the CLC Convention and Fund Convention were adopted incorporating the substance of the 1984 protocols, which together provide for higher compensation amounts and more extensive liability as well as modify the entry into force requirements.[334] The 1992 Protocols extended the scope of the Convention to cover pollution damage caused in the exclusive economic zone (EEZ) or equivalent area of a State Party. It also allows expenses incurred for preventive measures to be recovered even when no oil spill occurs, provided there was grave and imminent threat of pollution damage. The Protocols also extended the Convention to cover spills from sea-going vessels constructed or adapted to carry oil in bulk as cargo so that it applies to both laden and unladen tankers, including spills of bunker oil from such ships. Under the 1992 Protocols, a shipowner cannot limit liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, which is in line with the standard for breaking limitation contained in the 1976/1996 Limitation Convention.[335][336]

2003 Supplementary Fund Protocol

In the wake of some successive disasters from oil spills such as the *Nakhodka* incident in 1997 off Japan and the *Erika* incident in 1999 off France, the compensation limits of liability in the two 1992 Protocols proved to be too low to provide adequate compensation and were further increased by 50 percent by the 2000 Amendments which entered into force on 1 November 2003 under tacit acceptance.[337] Moreover, after coming into this century, since some States still considered the amended limits are too low to provide sufficient compensation for damage from major oil spills,[338] the Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage (Fund Protocol 2003) was adopted in 2003,[339] with the object to provide an additional,

meaning?

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[333] The 1984 Fund Protocol was drafted to make U.S. participation a necessary condition for reaching the second level of compensation. And moreover, the entry into force provisions of the protocol were written to ensure U.S. ratification; however, this effort eventually turned into failure since the United States Congress declined to adopt legislation implementing the international scheme and soon passed the Oil Pollution Act of 1990.

[334] The effect of which would be to allow them to come into force without U.S. participation. The two Protocols entered into force on 30 May 1996.

[335] From 16 May 1998, Parties to the 1992 Protocols ceased to be Parties to the 1969 CLC and the 1971 Fund Convention due to a mechanism for compulsory denunciation of the "old" regime established in the 1992 Protocols. The 1971 Fund Convention ceased to be in force on 24 May 2002 according to the Fund Protocol 2000. However, for the time being, the two regimes of CLC co-exist, since there are a number of States which are still Party to the parent conventions of 1969 and have not yet ratified the 1992 regime - which is intended to eventually replace the 1969 regime.

[336] The voluntary industry schemes, such as TOVALOP (Tanker Owner Voluntary Agreement Concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding a Supplement to Tanker Liability for Oil Pollution), which were designed to provide voluntary payment of compensation to victims of oil pollution who could not obtain adequate legal remedies in States which had not ratified the CLC and Fund Convention, have been terminated as of Feb. 20, 1997, to urge States to join the International Conventions in order to fill in the gap and further strengthen Convention scheme.

[337] The 2000 Amendments raise the compensation limits by 50 percent compared to the limits established under the 1992 CLC Protocol, and also raise the maximum amount of compensation payable from the IOPC Fund for a single incident. For the IOPC Fund, please visit http://www.iopcfund.org/

[338] For example, the *Prestige* incident off Spain in November 2002 which caused substantial spill response and environmental damage, has given the international society a shocking alert.

[339] The Protocol entered into force on 3 March 2005.

third tier of compensation for oil pollution damage. Participation in the Supplementary Fund is optional and is open to all Contracting States to the 1992 Fund Convention. However, those States that do not join will continue to enjoy their present cover under the current CLC/Fund regime.[340]

Exxon Valdez => Exxon paid $ 2 billion dollars for clean up

The Supplementary Fund Protocol significantly increases the amount of compensation available for pollution damage arising from oil tankers through the establishment of the Supplementary Fund, which is financed by oil receivers. The Supplementary Fund will not replace the existing Fund ('1992 Fund') but will make available additional compensation to victims in the States which accede to the Protocol. Under the Protocol, the total amount of compensation payable for any one incident will be limited to a combined total of 750 million SDR. This figure is inclusive of the amount of compensation payable under the 1992 Fund Convention (up to SDR.203 million) which is, in turn, inclusive of any compensation payable under the 1992 CLC Convention (between SDR.4.51 million and SDR.89.77 million depending upon the vessel's tonnage). So far, 21 states have ratified the Supplementary Fund Protocol. One important effect of the Protocol will be that, in practically all cases, it will be possible to pay compensation at 100% of the amount of the damage agreed between the Fund and the victim. It will also avoid the need to fix the level of payment below 100% of the amount of the damage suffered during the early stages of most major incidents as has been the case in respect of several recent incidents. Implementation of the Supplementary Fund Protocol should ensure that even in major oil spills, claims can be paid quickly and in full.[341]

2000 Amendment

2000 Amendment

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STOPIA and TOPIA

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Since the adoption of the 2003 Supplementary Fund Protocol, there was a wide concern that the burden of the compensation regime fell unfairly on the oil cargo industry. An acceptable mechanism needed to be established to increase the shipowner's share of the overall cost of claims. Thus, two new Agreements were established in 2006, namely the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA 2006) and the Tanker Oil Pollution Indemnification Agreement (TOPIA 2006). The object is to provide a mechanism for shipowners to pay an increased contribution to the funding of the international compensation system for oil pollution from ships, as established by the CLC/Fund 1992 and the Supplementary Fund Protocol 2003.[342][343]

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[340] Please visit http://www.iopcfund.org/. IOPC Funds are faced with a continuing problem of the failure of some member states to submit to the Fund Secretariat reports giving the quantities of contributing oil received by them each year. Without such information it is hard for the Secretariat to calculate a fair distribution of the burden of oil pollution compensation. To date, the Secretariat has done this on the basis of the oil returns actually received, which undoubtedly cover the majority of relevant oil shipments. However, without returns from all member states, even those whose relevant oil importers are nil, it is mathematically impossible to make a precise distribution. Fortunately, this has not prevented the Funds from maintaining a fair and effective regime to compensate the victims of oil pollution.

[341] For detailed discussion of the 2003 Protocol, see generally, Elizabeth Blackburn, *The 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992: one bridge over some particularly troubled water*, 9 Journal of International Maritime Law 530 (2003)

[342] The STOPIA and TOPIA 2006 were designed to reflect the support of shipowners for the compensation scheme established by the CLC/Fund 1992 regime and the commitment of shipowners to sharing the increased burden equally with oil receivers under the Supplementary Fund Protocol, and

2000 Amendment

Under the STOPIA, the owner of a tanker entered in a Club which is a member of the International Group will, in the event of tanker spills in a Supplementary Fund member state, raise the minimum threshold of the owner's liability (where the Fund comes in) from SDR 4.51 million for a tanker not exceeding 5,000 tons to SDR 20 million, equivalent to the CLC 1992 limit of a tanker of 29,548 tons. Because the indemnity is payable to the 1992 Fund, rather than directly to claimants, all contributors to the 1992 Fund will benefit when STOPIA applies. This scheme is intended to relieve the IOPC Funds of the burden of claims handling in all cases where the claims do not exceed this level. It is hoped that this will result in the IOPC Funds again becoming involved only in major cases, except for those cases where the shipowner's liability insurance cover is inadequate or non-existent.[344]

why should shipowner's voluntary increase there liability & compensation? 3

The STOPIA 2006 largely mirrors the original STOPIA which came into force since 3 March 2005.[345] However, the STOPIA 2006 differs from the original STOPIA in that it contains a review mechanism whereby the agreement may be adjusted to compensate prospectively if after the first ten years of its operation (and after every subsequent five years) the proportion of claims paid by either shipowners or oil receivers under all three conventions (CLC 92, Fund 92 and Supplementary Fund Protocol 2003) is greater than 55%. If that proportion is greater than 60%, the agreements must be adjusted. In addition, the STOPIA 2006 applies to all state parties to the 1992 Fund whereas the original STOPIA only applied to such states as were also party to the Supplementary Fund Protocol 2003.[346]

a The ~~S~~TOPIA 2006 is a voluntary agreement between industry and the Supplementary Fund under which the tanker owners will contribute 50% of any payments due from the Supplementary Fund, thereby reducing the burden on the oil industry. The ~~S~~TOPIA applies to all relevant tankers regardless of size. The TOPIA 2006 contains identical review and adjustment mechanisms as those set out in the STOPIA 2006 so that any imbalance in the proportion of claims borne by shipowners or oil receivers may be adjusted prospectively by amending the TOPIA or the STOPIA or both. ?

Insurers are not parties to these Agreements, but all Clubs in the International Group have amended their Rules to provide shipowners with cover against liability to pay Indemnification under the STOPIA 2006 and the TOPIA 2006.

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avoid the necessity to amend the Conventions. It is also intended to encourage widest possible ratification of the Supplementary Fund Protocol.

[343] See Z Oya Ozcayir, *Developments in the International Oil Pollution Compensation Regime*, 12 Journal of International Maritime Law 428, 431-433 (2006)

[344] The International Group of P&I Clubs produced data showing that for the policy year 2007-2008, out of a total of 6058 tankers entered in Clubs which are members of the Group, 5680 are entered in STOPIA and only 378 are not. Those that are not are in almost all cases very small. The Group Member Clubs are actively encouraging the owners of all tankers not yet entered in STOPIA to join in.

[345] The STOPIA 2006 and the TOPIA 2006 took effect from 20th February 2006. As such, the original STOPIA was terminated.

[346] It had been proposed that the offer should be made to extend the benefits of STOPIA to all states party to CLC 92. Because STOPIA 2006 operates by indemnifying the 1992 Fund rather than by paying claimants directly, a different contractual mechanism would have been required to extend a similar benefit to the small handful of states which are party to CLC 92 but not the 1992 Fund. However, at the IOPC Fund Assembly meeting it was agreed that this offer should not be extended to non-Fund states, given that it would act as a disincentive to them becoming signatories to the 1992 Fund.

4.2.1.2 Pollution Claims against Persons other than Shipowners

Although the language in Article 3(b) of the 1976 Convention appears to explicitly indicate that pollution claims as defined by the CLC Convention are excluded from limitation, nevertheless, difficulties may arise when defining the precise scope of this exclusion. The relationship between the 1976/1996 Limitation Convention and the 1969 CLC Convention as amended by the 1992 Protocol is not so simple as the wording was intended, because the arrangements under the two conventions are quite different.

Under the 1969 CLC Convention all claims for compensation for pollution damage have to be brought against the shipowner from which the polluting oil escaped or was discharged; no claim for such damage can otherwise be made against other persons such as the servants or agents of the shipowner. That is, the CLC Convention applies only to the shipowners, and the shipowner is defined to mean only the registered owner of the ship (including the operator of a state-owned ship), or in the absence of registration, the person owning the ship. The 1992 Protocol further provides expressly for prohibition of pollution claims against charterers (even demise charterers), manager or operator of the ship, and salvors etc.[347] Therefore, it is clear that such parties cannot rely on the limitation provisions of the CLC Convention. However, the 1976 Limitation Convention includes those parties such as charterers, managers, operators, salvors and etc. within limitation protection. Consequently, this may lead to some argument on the application of limitation under the Conventions to such parties, that is, whether those parties may rely on the 1976 Limitation Convention to limit their liability for pollution claims, or, they may not be entitled to the limitation privilege either under the CLC Convention or the 1976 Convention.[348]

It is assumed that Article 3(b) of the 1976 Limitation Convention was drafted simply to ensure that a shipowner's right of limitation for oil pollution claims within the CLC should remain governed by the CLC Convention, and not by the 1976 Convention. Now the argument mainly focuses on whether the wording of Article 3(b) does require that the liability for pollution claims should be incurred under CLC.[349] If the answer is negative, it will apply to all claims for oil pollution damage within the meaning of the 1969 Convention, even if the liability arises in some other way than under CLC itself. It could result in unlimited liability in cases where claims for pollution damage are brought outside CLC against parties other than the shipowner. If the answer is positive, Article 3(b) had to be read in the sense that it only dealt with a claim against the shipowner that was actually made under the CLC Convention, and not other claims for oil pollution damage, for otherwise a party other than the shipowner would face unlimited liability for pollution claims and that could not have been intended

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[347] Article 4 of the 1992 Protocol provides that unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, no claim for pollution damage under the convention or otherwise may be made against the servants or agents of the owner, members of the crew, the pilot, the charterer (including bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or preventive measures.

[348] Colin de la Rue, *Limitation and pollution claims*, Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton

[349] Richard Williams, *What limitation is there on the right to limit liability under the 1976 Limitation Convention*, International Journal of Shipping Law 117, 121 (1997)

when drafting the Convention. Perhaps the best solution to this loophole in the 1976 Convention should be filled up by the domestic legislation which incorporates the Convention; otherwise it would be advisable for the parties other than shipowners to take additional insurance cover for their own sake against the risk of possible unlimited liability.[350]

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The U.K legislation is a good example in releasing the potential exposure on the part of those parties to unlimited liability for pollution claims created by the impact of two parallel but inconsistent limitation regimes. The CLC Convention was not given the force of law in the U.K.; instead, the terms of the CLC were enacted in the Merchant Shipping (Oil Pollution) Act 1971. The interrelationship between the Merchant Shipping (Oil Pollution) Act 1971 and the 1976 Convention as given the force of law by the Merchant Shipping Act 1995 was specifically provided, i.e., the only claims excluded from Article 3(b) of the 1976 Convention were claims in respect of liabilities incurred under the Merchant Shipping (Oil Pollution) Act 1971.[351] Therefore, under the U.K. law, Article 3(b) applies only to liabilities actually incurred under the CLC. In addition, it does not prohibit persons other than a shipowner within the restrictive meaning given by the Merchant Shipping (Oil Pollution) Act 1971 (e.g. a charterer, manager, operator or salvor) to seek to limit their liability for oil pollution under the 1976 Convention.[352] For example, in *The Aegean Sea*,[353] one of the issues was whether the recourse claims for pollution damage by the shipowners against charterers were excluded by Article 3(b) of the 1976 Convention. Since the relevant pollution claims, i.e., claims for property damage, clean up and prevention costs and loss of use and loss of profit claims, fell within Article 2(1)(a) as they were either in respect of damage to property polluted by oil which escaped as a result of the stranding of the vessel on the rocks or were consequential loss resulting therefrom and had occurred in direct connection with the operation of the ship as they occurred either because of the decision to order the vessel to go to an unsafe port or because of the way the vessel was navigated, they were accordingly subject to limitation.

4.2.1.3 Claims for Pollution by Bunkers from Non-tankers

— entry into force 21 November 2008

Special limitation regimes usually have limited scope of application. The 1992 Civil Liability Convention covers spills of cargo and/or bunker oil from laden and unladen sea-going vessels constructed or adapted to carry oil in bulk as cargo (i.e. tankers).[354] Therefore, the CLC/Fund regimes for oil spills do not cover bunker oil spills from non-tankers. Furthermore, the liability for bunker spills caused by a conventional vessel is not excluded by the CLC exclusion under Article 3(b) of the 1976 Convention. Thus, the global limitation system may come into play as long as the

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[350] Nicholas Gaskell, *Pollution Limitation and Carriage in The Aegean Sea*, *Lex Mercatoria*: Essays on International Commercial Law in honour of Francis Reynolds, 2000 L.L.P. (Where the author indicated the importance of additional insurance cover for charterers for oil pollutions claims, for instance, in *The Aegean Sea*).

[351] See paragraph 4(2) of Part II of Schedule 7 to the MSA 1995 (Originally paragraph 4(1) of Part II of Schedule 4 to the MSA 1979).

[352] Article 2 of the 1976 Convention (claims subject to limitation) contains no reference whatsoever to the environment or to pollution claims. However, it should not affect its application to the pollution claims as long as the claims for pollution damage are within those subject to limitation.

[353] (1998) 2 Lloyd's Rep. 39

[354] The 1992 CLC has widened the coverage of the 1969 CLC which was applicable solely to laden tankers.

shipowner could prove that the claim for compensation caused by bunker spill is the type of claim subject to limitation under Article 2 of the 1976 Limitation Convention.[355]

However, the global limitation is not a good solution to compensation liability for pollution damage caused by bunker oil. Experience of bunker spill clean-ups has indicated the need to establish international rules on liability and compensation for pollution damage caused by bunker oil. Indeed, many general cargo ships carry more oil as bunkers than tankers as cargo. Bunker spills are also more expensive to clean up. The need for a Bunker Pollution Convention was recognized when the 1969 CLC Convention was being drafted. It was initially intended that the 1969 CLC Convention would cover pollution caused by ships' bunkers since the Legal Committee of the IMO initiated to adopt a comprehensive set of unified international rules to assure prompt and effective compensation to all victims of oil pollution from ships. It proved impossible to achieve mainly because of the close interrelationship between the 1969 CLC and the 1971 Fund Convention. The oil industry could not be persuaded that it should contribute to the cost of bunker spills since bunkers generally belong exclusively to the shipowners. Years later when the Hazardous and Noxious Substances Convention (HNS Convention) was drafted, it had been proposed to include bunker oil within the HNS Convention. Nonetheless, the proposal was finally rejected for the same reasons as bunker oil was excluded from the CLC/Fund Convention. A separate Convention appeared to be more practicable for dealing with bunker oil spills.

? container vessel

[illegible]

Thus, in 2001, the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of bunker fuel oil, so as to fill in the gap in the liability and compensation regime for pollution damage.[356] The Bunker Convention is modeled on the CLC Convention and applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States Parties. The Convention provides a free-standing instrument covering pollution damage only. A small group of persons, including the registered owner, bareboat charterer, manager and operator of the ship, are identified as the shipowner, who will be responsible for pollution damage caused by any bunker oil on board or originating from a ship.[357]

ok

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[355] It seems possible that Article 2 would enable a shipowner to limit liability for property damage caused by such bunker spills, consequential loss, and the actual cost of reasonable measures for reinstatement of the environment. However, sometimes, liability for the cost of dealing with bunker spills goes hand in hand with liability for wreck removal, and in many countries this is excluded from limitation. See Colin de la Rue, *Limitation and pollution claims,* Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton.

[356] This Bunker Convention will enter into force as of November 21st, 2008.

[357]. Where more than one person is liable, their liability shall be joint and several. It had been argued whether the person liable under the Convention should be limited to only the registered shipowners as the CLC Convention and the HNS Convention, or extended to include other parties. Finally, as there is no special fund set up to deal with bunker spills like the CLC/Fund and HNS Convention, for the purposes of protecting victims from pollution damage of bunker oil, the latter opinion prevailed as embodied in the current provision of Article 1(3) of the Convention. To balance, a resolution was passed to urge States, when implementing the Convention, to consider the need to introduce legal provision for protection for persons taking measures to prevent or minimize the effects of bunker oil pollution. It recommends that persons taking reasonable measures be exempt from liability unless the

Under the Convention, the registered owner of a vessel over 1,000 gross tonnage is required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover his liability for pollution damage caused by bunker oil on board or originating from the ship. The amount is equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the 1976 Limitation Convention as amended by the 1996 Protocol.[358] The Convention allows a claim for compensation for pollution damage to be brought directly against an insurer. In other words, the Convention has not established its own individual limitation regime but instead is linked up with the global limitation regime for the unification of the limitation regime for maritime claims. Furthermore, unlike the CLC/Fund Convention and the HNS Convention, no special fund is set up to deal with bunker spills since the regime of contribution by cargo owners is not appropriate for bunker oil which usually belongs to the shipowners.

!!! ok

~~Level of compensation?~~

4.2.2 Claims for Pollution by Hazardous and Noxious Substances

As indicated above, the CLC/Fund Conventions have very narrow scope which is limited essentially to persistent oil carried in oil tankers. However, there are other substances other than oil, such as chemicals, that may cause serious damage during marine transport as well and therefore call for more and more public attention. Indeed, liability and compensation for pollution by such substances has been put in the work program of the IMO since 1969 when the CLC Convention was adopted. After many years of preparation, discussion, and drafting process, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention, not yet in force) was finally adopted on May 3rd, 1996 to deal with compensation liability involving hazardous and noxious substances.

The HNS Convention is based on the two-tier system established under the CLC/Fund Conventions. In addition, it covers not only pollution damage but also the risks of fire and explosion, including loss of life or personal injury as well as loss of or damage to property. The HNS Convention excludes pollution damage as defined in the CLC/Fund Conventions, to avoid an overlap with these Conventions. HNS are defined by reference to lists of substances included in various IMO Conventions and Codes. The Convention introduces strict liability for the shipowner and a system of compulsory insurance and insurance certificates, and makes it possible for up to 250 million SDR to be paid out to victims of disasters involving HNS.[359]

Progress in ratification of the HNS Convention has been regrettably slow. To date only ten states have ratified this Convention, of which two States have ships with a total tonnage of at least 2 million gross tonnage (Russia Federation and Cyprus). The majority of those states have not provided the statistical data on quantities of HNS

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liability in question resulted from their intentional or reckless act or omission. It also recommends that States consider the relevant provisions of the 1996 HNS Convention as a model for their legislation.

[358] For that purpose, the Conference which adopted the Convention also adopted the resolution to urge all States to ratify, or accede to the Protocol of 1996 to amend the 1976 Limitation Convention. Please visit http://www.imo.org/

[359] Please visit http://www.imo.org/

imported by them which is necessary for the Secretariat to calculate the initial call for funds.[360] There is an evident reluctance on the part of the governments of several large HNS importing states to burden their chemical industry with the financial contributions involved. The European Union is encouraging its Member States to ratify this Convention and many of them are well on the way to doing so.[361]

Since the 1976 Limitation Convention does not contain an express exclusion of liabilities arising from the escape of HNS substances, to avoid overlap between the Limitation Convention and the HNS Convention, the 1996 Protocol to amend the 1976 Convention has explicitly allowed the right of reservation to exclude claims for damage within the meaning of the 1996 HNS Convention or of its amendment or protocol.[362] In other words, the 1996 Protocol enables parties to the Limitation Convention to extend the exclusion to claims covered by the 1996 HNS Convention.

4.2.3 Under the Domestic Legislations

4.2.3.1 Under the U.K law

The U.K. government, as an active initiator and participant of various international maritime conferences, meetings and drafting of legal instruments for maritime issues, has always followed closely the development of international maritime conventions. The U.K. has ratified the CLC and Fund Conventions.[363] Furthermore, the Merchant Shipping (Oil Pollution) (Supplementary Fund Protocol) Order 2006[364] amends the Merchant Shipping Act 1995 to give legal effect in the U.K. to the 2003 Supplementary Fund Protocol.[365]

In the same vein, the U.K. is also the signatory of both the 1996 HNS Convention and the 2001 Bunker Oil Convention.[366] Pursuant to Article 3(b) of the 1976/1996 Limitation Convention, claims for oil pollution damage within the meaning of the CLC Convention are excluded from global limitation under the U.K. legislation; and pursuant to Article 18(1)(b) of the 1996 Limitation Protocol, the U.K. reserves the right to exclude claims for damage within the meaning of the 1996 HNS Convention or its amendment or protocol from global limitation.

4.2.3.2 Under the Chinese law

China is nowadays a big oil importing country and therefore faced with severe threat

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[360] Cyprus submitted a report on contributing cargo on 27 November 2006; Slovenia submitted a report on contributing cargo at the time of acceding to the Convention (21 July 2004). The Secretariat of the IOPC Funds has undertaken the administrative tasks necessary to get the HNS Fund into operation. For more information on the HNS Convention, please visit http://www.hnsconvention.org/

[361] In November 2002, the European Council adopted a decision (2002/971/EC) requiring all European Union Member States to take the necessary steps to ratify the HNS Convention within a reasonable time period

[362] See Article 18(1)(b) of the 1996 Protocol to the 1976 Limitation Convention.

[363] The 1992 CLC/Fund Conventions were effective on May 30, 1996 in the U.K.

[364] S.I. 2006 No. 1265

[365] The Order gives effect to the Council Decision 2004/246/EC (O.J. L78/22, 16.3.2004) authorizing Member States to ratify the Supplementary Fund Protocol in the interests of the European Community within a reasonable time. The Supplementary Fund Protocol was effective in the U.K. on Sep. 8th, 2006.

[366] The 2001 Bunker Oil Convention will be effective in the U.K. on Nov. 21st, 2008.

④ Personal opinion?

from oil pollution damage. According to Article 208(b) of the Maritime Code, claims for oil pollution damage within the meaning of the CLC Convention to which China is a party are excluded from global limitation. China has adopted the CLC 1969 on January 30, 1980 (effective on April 29, 1980), and the CLC 1992 on January 5th, 1999 (effective on January 5th, 2000, at the same time China denounced the CLC 1969).[367] However, China has not adopted the complementary Fund Convention yet due to conflict of different interests.[368] For years, there have been numerous arguments involved with whether China should ratify the Fund Convention. On one hand, in China, many oil tankers are very small; therefore the damages caused are generally below the compensation limits of the Convention, the fund will bring the contributors, i.e., cargo owners unnecessary burden.[369] On the other hand, compensation to victims and protection of environment should not be ignored by solely taking the interests of shipping industry and oil industry into consideration. Suppose that one major oil spill disaster like *The Amoco Cadiz* groundings[370] occurs in the coastal waters of China, it would be too late to be of any benefit to China even if it hastily prepares the instruments of accession in the wake of the incident to bring the convention into force. However, for practical considerations, it is assumed that the right time for China to adopt the Fund Convention has not come yet and China is right now determined to establish its own domestic oil pollution compensation fund.

Can you ratify CLC 1992 without ratifying 1992 Fund Convention ?

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→ You do not have to

Clean-up work is not an easy task in China, since the financial support for clean-up operations cannot be guaranteed.[371] This is primarily because there is no comprehensive compensation regime for oil pollution damage in China. Currently, in China the 1992 CLC Convention is only applicable to oil tankers over 2000 tons which are engaged in international transport. There are no specific laws governing the compensation liability for oil pollution damage caused by vessels engaged in coastal transport, or by vessels below 2000 tons. Neither does the Maritime Code contain provisions to deal with oil pollution damage.

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In addition, even within the framework of the CLC 1992, if some major accident incurs huge clean-up expenses which exceed the limits in the CLC, or the wrongdoing shipowners could not be identified, or the shipowners are wound up, the victims are still left uncompensated. Therefore, it is highly important to establish a domestic compensation regime for oil pollution damage by reference to the CLC/Fund regime. Compulsory insurance and compensation fund are the effective solutions to clean-up expenses and compensation for the victims of oil spills caused by vessels engaged in the coastal transport or small tankers in China.

? Why a domestic compensation regime? ⑤

The Marine Environmental Protection Law was amended to fulfill the task.[372]

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[367] China declared that the CLC Convention 1992 will also be applicable to the Hong Kong Special Administrative Region and to the Macao Special Administrative Region with effect from 24 June 2005.

[368] The Fund Convention 1992 took effect for Hong Kong Special Administrative Region only as of January 5th, 2000 (Prior to this date, it was the Fund Convention 1971 that was effective in Hong Kong region as from Oct. 16th, 1978). Therefore, oil pollution damage cannot be covered by the Fund elsewhere in China.

[369] This is the case for another big oil importing country, Japan.

[370] [1984] 2 Lloyd's Rep. 304

[371] See, e.g., *The Minrangong No.2*, Guangzhou Mar. Court (Shi Zi) Civil Ruling No. 76 (1999) (unavailability of sufficient insurance).

[372] The Marine Environmental Protection Law took effect on March 1st, 1983, and was amended and effective on April 1st, 2000.

According to Article 66 of this Law, the State shall establish and implement compensation liability regime for oil pollution from ships; the State shall, in accordance with the principle that the shipowners and cargo owners jointly take the risk of compensation liability for oil pollution from ships, establish insurance and compensation fund system for oil pollution. The specific rules for implementing the system of insurance and compensation fund for oil pollution shall be promulgated by the State Council.

For that purpose, the Regulations on Administration for Preventing Marine Environment by Vessels[373] is being amended and expected to be promulgated by the State Council soon, in which compulsory insurance for oil pollution from vessels engaged in coastal transportation will be explicitly provided by Chapter 9 (Insurance and Compensation for Oil Pollution), including compulsory insurance of vessels, recognition of compulsory insurance, limits of liability, scope of compensation, priority of compensation and etc. Meanwhile, the Ministry of Finance and Ministry of Transport have jointly drafted the Rules on Administration of Collection and Use of Compensation Fund for Oil Pollution from Vessels, which is pending for approval by the State Council. This compensation fund will be implemented in phases. The initial phase will be based on the principle of low insurance, low contribution and low compensation, then at the later phase the insurance and compensation will be gradually improved. The underlying objective is to make preparations for the accession to the Fund Convention by way of the experiences gained from the management and operation of domestic compensation fund. To sum up, in China, international convention and domestic regime will be co-existing and constitute the overall compensation regime for oil pollution.

As far as the pollution damage by bunker spill is concerned, considering the impact of compulsory insurance for various kinds of vessels to the shipping industry, marine administration and the capability of the insurance market, it seems not realistic for China to ratify the Bunker Oil Convention in the near future and probably a domestic compensation regime will be established soon. In the long run, China will ratify the Convention for the protection of victims and environment. Then China will probably make reservations to exclude the application of the Convention to ships operating exclusively within the territorial sea, as is allowed by Article 7(15) of the Convention, and leave it to be regulated by domestic law. It is also advisable to increase the limits of liability in the Maritime Code to the level of those provided in the 1996 Protocol to the 1976 Limitation Convention so as to coordinate with the Bunker Oil Convention.

At present, there is no specific law governing the liability and compensation for hazardous and noxious substances in China. The general provisions in the Marine Environmental Protection Law could not provide sufficient protection to the victims and environment. It is assumed that China will not adopt the 1996 HNS Convention soon because the main obstacle is, similar to that under the CLC/Fund Conventions, focused on the contribution of the fund by cargo owners which is provided by the 1996 HNS Convention. It is anticipated that with the set-up and implementation of a compulsory insurance and compensation fund for oil pollution, China will for the current stage probably establish and implement its own domestic compensation regime for hazardous and noxious substances by reference to that for oil pollution

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[373] The original Regulations were promulgated and effective on Dec. 29, 1983.

compensation.

Besides the efforts on establishing an insurance and compensation fund system for pollution damage, it is proposed that the Maritime Code should also be amended by adding a chapter specially dealing with pollution damage caused by various substances such as oil, hazardous and noxious substances, and bunker oil. Probably when amending the Maritime Code, considering that China may ratify the HNS Convention and Bunker Oil Convention in the future, the claims for hazardous and noxious substances and bunker oil as defined respectively by the HNS Convention and the Bunker Oil Convention should be explicitly excluded from the limitation of liability under Article 208 of the Maritime Code.

4.2.3.3 Under the U.S. law

The United States, as a major oil importer, was reluctant to accept the CLC/Fund Conventions and chose to remain outside the international scheme. There were several causes for this decision. Firstly, given the inclination for litigation in the United States and the reluctance of the legislators and the courts to recognize any kind of limitation, the U.S. were not satisfied with the "low" compensation amount under the two conventions, especially since the new compensation package also includes new rules about breaking limitation, i.e., intentional or reckless act. Secondly, the United States refused to subordinate state legislation in the area of marine pollution to any federal legislation. Thirdly, the *Exxon Valdez* incident in 1989 in Alaska further urged the U.S. to enact its own statute on oil pollution. The combination of the above circumstances determined the failure of any federal legislation based on the international scheme in the United States.

As a result, the U.S. introduced the Oil Pollution Act of 1990 (OPA) to govern the compensation liability for oil pollution claims. Prior to the enactment of the OPA 1990, oil pollution claims were exposed to a legislative area of enormous complexity and conflict. The OPA created uniformity by repealing and amending the liability provisions of several federal liability acts. This statute establishes liability and limitation of liability for damages resulting from oil pollution, and also establishes its own oil spill liability trust fund for the payment of compensation for such damages.

The OPA, adopted in the wake of the *Exxon Valdez* incident, differs from the international regime in many material aspects. Under the OPA, liability for oil pollution damage is placed on the owner, operator and demise charterer.[374] Certainly, the ceiling for shipowners liability is even higher than those specified in the 1992 CLC/Fund Conventions,[375] and the standard for breaking limitation of liability is different.[376] The OPA also extends its application to oil pollution caused by all kinds of vessels, including tankers and non-tankers and even facilities. Most significantly, this federal legislation is not exclusive and allows states to legislate their own regimes. The OPA explicitly provides that nothing in either OPA or in the Limitation Act shall

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[374] 33 U.S.C. 2701.

[375] 33 U.S.C. 2704. The limits of liability for oil removal costs and damages that result from discharges or substantial threats of discharge of oil from vessels under OPA were amended by the enactment of the Delaware River Protection Act 2006, title VI of the Coast Guard and Maritime Transportation Act 2006.

[376] 33 U.S.C. 2704©.

"affect, or be construed or interpreted as preempting, the authority of any State" to impose additional liability or requirements with respect to oil pollution.[377] Since OPA permits states to impose additional liabilities on a polluter, state laws are even more important than before.[378] The OPA has actually subjected shipowners to strict unlimited liability for removal and cleanup costs as well as damages in many state laws in the U.S. when oil pollution is involved.[379]

As far as pollution damage caused by hazardous and noxious substances is concerned, the U.S. has established the superfund for hazardous substances, pollutants, & contaminants by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[380] The CERCLA is the principal statute governing the cleanup of sites contaminated with hazardous substances and responses to spills of those substances. The statute establishes liability for site cleanup, prescribes a procedure for identifying and ranking contaminated sites, provides funding for site cleanups, reduces uncontrolled releases of hazardous substances, establishes cleanup procedures that provide protection for humans and the environment, and restores injured natural resources through provisions administered by the natural resource trustees. In conjunction with OPA, it mandates a "National Oil and Hazardous Substances Pollution Contingency Plan (NCP)" to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.[381]

To sum up, claims for oil pollution or other special categories of damage are subject to separate limitation systems from the global limitation regime. Therefore, till now the global limitation together with the special limitation regimes constitute a comprehensive system for limitation of liability to ensure that in most cases claimants will receive adequate compensation. However, in practice it is not always easy to determine whether a particular claim should fall within the scope of one regime or the other. Disputes might arise in coordinating these parallel but possibly inconsistent limitation regimes under various applicable circumstances.[382]

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[377] 33 U.S.C. 2718(a).

[378] In response to OPA, most coastal states and the Great Lakes states have enacted or changed oil pollution legislations towards imposing unlimited liability for removal and cleanup costs as well as damages.

[379] The OPA has vigorous impacts upon the system of limitation of liability of the international regime on oil pollution liability and compensation. Some believe that to some extent it has strengthened the questioning of the justification of a limitation regime. "It is hoped that the American Oil Pollution Act of 1990 turns out to be the statute which sounded the death knell for maritime limitation of liability." See G. Gauci, *Limitation of Liability in Maritime Law: an anachronism*, 19 Marine Policy 65, 74 (1995)

[380] 42 U.S.C. 9601. The statute was amended by the Superfund Amendment and Reauthorization Act (SARA) in 1986, which adds extensive public "right-to-know" and emergency planning requirements, establishes a fund for leaking underground storage tanks, and imposes worker safety requirements for hazardous materials.

[381] Please visit http://www.darrp.noaa.gov/

[382] The global limitation applies to general claims, the CLC Convention applies only to oil pollution damage, the HNS Convention only to damage caused by the HNS substances, and the Bunker Convention only to bunker spills from non-tankers. Wreck removal expenses may also be taken into account if they are excluded from global limitation under the applicable law. Probably there are also other persons who may enjoy special limitation regimes under domestic legislations, e.g. pilot and pilotage authorities, harbour authorities and dock owners. Colin de la Rue, *Limitation and pollution claims,* Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton

4.3 Claims for Nuclear damage

4.3.1 Under the Conventions

Claims for nuclear damage are also excluded under the 1976 Convention. The 1957 Limitation Convention does not contain such provisions on claims arising from nuclear damage. Pursuant to Article 3(c) of the Convention, claims which are the subject of an international convention or national legislation governing or prohibiting limitation of liability for nuclear damage are excluded from limitation of liability.

However, Article 3(c) does not contain any specific reference to any particular international convention. Generally speaking, the pertinent international regimes in force include the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy under the auspices of the Nuclear Energy Agency (NEA) which covers most West European countries and the 1963 Vienna Convention on Civil Liability for Nuclear Damage[383] under the auspices of the International Atomic Energy Agency (IAEA) which is more worldwide.[384] The Paris and the Vienna Conventions are supplemented, in relation to maritime transport, by the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material which regulates liability in respect of damage arising from the maritime carriage of nuclear substances.[385] The purpose of the 1971 Convention is to resolve difficulties and conflicts which arise from the simultaneous application to nuclear damage of certain maritime conventions dealing with shipowners' liability, as well as other conventions which place liability arising from nuclear incidents on the operators of the nuclear installations from which or to which the material in question was being transported.[386]

Pursuant to Article 3(d) of the 1976 Convention, claims for nuclear damage caused by a nuclear ship are also excluded from limitation. Although Article 3(d) does not refer to any international convention, it is generally agreed that the pertinent Convention is the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships 1962, which basic features follow the rules of nuclear instead of maritime law.[387]

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[383] The Convention came into force on November 12, 1977.

[384] Coverage under the Paris Convention is extended by the 1963 Brussels Supplementary Convention and amended three times by Additional Protocols adopted in 1964, 1982 & 2004. Furthermore, the Paris and Vienna Conventions have been linked by the 1988 Joint Protocol. Please visit http://www.nea.fr/

[385] The Convention came into force on 15 July 1975. The U.K., the U.S. and China have not ratified this Convention.

[386] The 1971 Convention provides that a person otherwise liable for damage caused in a nuclear incident shall be exonerated for liability if the operator of the nuclear installation is also liable for such damage by virtue of the 1960 Paris Convention, or the 1963 Vienna Convention, or national law which is similar in the scope of protection given to the persons who suffer damage.

[387] Under the Convention (not yet in force), the operator of a nuclear installation is exclusively and absolutely liable for nuclear damage inflicted by the ship and may limit his liability for each nuclear incident. The liability regime of the Convention was included almost identically in numerous bilateral agreements. The legislative goal of international law on liability for nuclear damage was primarily conceived to relieve the nuclear supply industry of the incalculable risks posed by high compensation claims. Therefore, the nuclear liability conventions `channel' the duty to compensate exclusively to the operator and exonerate all other parties involved in the development of nuclear energy from any obligation to compensate for nuclear damage.

4.3.2 Under the Domestic Legislations

Under the U.K. law, with respect to liability and limitation of liability of nuclear damage, the Nuclear Installation Act 1965 shall apply. The 1995 Merchant Shipping Act provides that the claims which are to be excluded from the 1976 Limitation Convention as applied in the UK are those claims "made by virtue of any of section 7 to 11 of the Nuclear Installations Act 1965".[388]

Under the Chinese limitation law, which closely follows the 1976 Limitation Convention, claims for nuclear damage under the International Convention on Limitation of Liability for Nuclear Damage to which China is a party and claims against the shipowner of a nuclear ship for nuclear damage are explicitly excluded from the limitation regime by virtue of Articles 208(3)(4) of the Maritime Code. China has not acceded to any international convention relating to liability for nuclear damage; moreover, domestic laws in this area are not quite clear. Therefore, it is an unsettled issue in China as to what law shall govern the liability for nuclear damage.

In the U.S., the Price-Anderson Nuclear Industries Indemnity Act (the Price-Anderson Act), originally enacted by Congress in 1957 and renewed several times (the latest renewal is till the year of 2025), prescribes a limited liability regime for nuclear power plant operators in the event of a nuclear accident in the United States.[389]. The main purpose of the Act is to indemnify the nuclear industry against liability claims arising from nuclear incidents while still ensuring compensation coverage for the general public.[390]

4.4 Claims under Contracts of Service

4.4.1 Under the Conventions, the U.K. Law and Chinese Law

According to Article 3(e) of the 1976 Convention, claims are excluded as such by or on behalf of servants of shipowners or salvors under certain contracts of service where limitation is either denied or limited to a higher amount than that set out in the 1976 Convention by the law governing the particular contract of service. There is a similar exclusion, although in different wordings, in the 1957 Limitation Convention.[391] This exclusion is based upon the belief that the limitation regime of the Convention should not interfere with the well-established compensation schemes under domestic laws of the Contracting States governing the employment of seamen or any other maritime servants in the service of a ship. It is not entirely clear what types of claims relating to contracts of service are conceived under this exclusion. Presumably, claims for wages and claims for maintenance and cure are to be excluded.

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[388] See Section 185 and paragraph 4(3) of Schedule 7, Part II, of the 1995 MSA.

[389] 42 U.S.C. 2210

[390] When the Act was enacted, it was considered necessary as an incentive for the private production of nuclear power since investors were unwilling to accept the unknown risks of nuclear energy without limitations on their liability. The Act has been criticized by a number of groups, including many consumer protection groups. In 1978, the Act survived a constitutional challenge in the Supreme Court case of *Duke Power Co. v. Carolina Environmental Study Group.*

[391] See Article 1(4)(b) of the 1957 Convention. The 1976 Convention, in order to coordinate with the inclusion of salvors within the protection of limitation of liability, further extends the exclusion of the right to limitation to claims by or on behalf of the servants of salvors under a contract of service.

Under the U.K. law, the pertinent provision on exclusion of claims arising under contracts of service is found in section 185(4) of the 1995 Merchant Shipping Act. This section expressly provides that such liability is not subject to limitation if the contract of service is governed by the law of any part of the U.K. and the liability arises from an occurrence which takes place after the commencement of the 1995 MSA.[392]

Under the Chinese legal regime, similar to the 1976 Limitation Convention, by virtue of Article 208(5) of the Maritime Code, claims arising out of contracts of service are expressly excluded from the application of limitation of liability.[393]

Contract of Service

The meaning of "contract of service" has raised many arguments; especially nowadays the employment relations are even more complicated and flexible, with more temporary and shared employment. There is no special statutory definition for "contract of service" in the 1976 Convention.[394] The authorities indicate that it is often difficult to identify clearly whether a particular relationship is a "contract of service" or not. However, a number of tests have been developed to determine the nature of the relationship between parties engaged in a business to see whether there is a "contract of service" between one as "employer" and the other as "employee".

Generally speaking, all the relevant factors (some factors pointing one way while some pointing the other) will be weighed up and evenly balanced; no single factor is solely determinative,[395] and no strict rules could be laid down as to the relative weight which the various considerations should carry in particular cases. Some judicial observations and analysis may provide certain general guidance. For instance, in *Market Investigations Ltd. V. Minister of Social Security,*[396] Mr. Justice Cooke observed that the fundamental test was whether the person concerned was performing the relevant services in business on his own account. For that purpose, he identified a number of indicators which certainly could not be exhaustive, including (i) who had control over the method of doing the work concerned; (ii) who provided the equipment for the work to be done; (iii) who hired others to assist in the work to be done, the workman himself or the person who had hired him; (iv) what degree of financial risk did the workman take; (v) what degree of responsibility for investment and management did the workman have; (vi) whether (and if so to what extent) the workman had an opportunity of profiting from sound management in the performance of his task.[397]

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[392] The 1995 MSA came into force on 1 January 1996.

[393] Article 208(5) of the Code provides that the excluded claims are "claims by the servants of the shipowner or salvor, if under the law governing the contract of service, the shipowner or salvor is not entitled to limit his liability or if he is by such law only permitted to limit his liability to an amount greater than that provided for in this Chapter" (Chapter 11-limitation of liability for maritime claims).

[394] It appeared that there was no relevant discussion concerning Article 3(e) in the *travaux preparatoires* of the 1976 Convention.

[395] In *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374, the court said no single test was found to conclusively point to the distinctive feature as between a "contract of services" and a "contract for service".

[396] [1969] 2 Q.B. 173, 184-185

[397] It is also helpful to refer to the observation by Mr. Justice Mackenna in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance*, [1968] 2 Q.B. 497, 515: A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a

Indeed, each case ultimately depends upon its particular facts, and frequently it depends upon the relative weight that the judge may give to some particular factors rather than the others.[398] For instance, in *Todd and Others v. Adams and Chope,*[399] the key issue is to determine whether the crew on board were under contract of service or they were under an arrangement with the shipowners whereby they were joint venturers or parties to "contracts for services" as share fishermen, so as to determine whether the shipowners were entitled to limit their liability in accordance with the 1995 Merchant Shipping Act.[400]

According to the judge at the first instance, the crew were held to be employees under contract of service within the meaning of section 185(4) of the 1995 MSA, because each crew member was under a contract with the owners whereby he would provide his services for each fishing trip, under the ultimate control and directions of the shipowners and where the shipowners provided the bulk of the equipment and the management of the fishing business. Therefore, the shipowners were not entitled to limit their liability.

However, the Court of Appeal overruled the decision at the first instance and held that the factors of control investment and management which the Judge at the first instance stressed were less clear and less weighty; while the financial arrangements between the parties (the crew would share the profits from the sale of any catch; to some extent they shared losses), as well as the factor that the crew were treated as self-employed for the purposes of tax and social security purposes should be given added weight. The deceased crew members had an independent relationship with the shipowners, and accordingly the claims on behalf of them were subject to limitation. It is obvious that in this particular case, the Court of Appeal mainly took into account whether crew members shared in losses as the decisive factor in determining whether they were employed under a contract of service or not.[401]

4.4.2 Under the U.S. Law

The language of section 183(a) of the U.S. Limitation Act seems to be broad enough to include all kinds of losses, damage and injury; besides, by the additional provision of section 189, the right of limitation is extended to "all debts and liabilities" of shipowners not enumerated in the original 1851 Limitation Act – this was specifically

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wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it being a contract of service.

[398] See, e.g., *Noble v. Osprey Trawlers Ltd.*, 1998 S.C. 835; *Redman v. Piriou*, April, 2001, unreported; *Lane v. Shire Roofing Co. Ltd.*, [1995] I.R.L.R 493.

[399] [2001] 2 Lloyd's Rep. 443; [2002] 2 Lloyd's Rep. 293. On Nov. 11, 1997, the beam trawler *Maragetha Maria*, when making her way into the English Channel, capsized and sank, all her crew on board were drowned (including her skipper, her mate and two deckhands). The claimants, widows and dependants of the drowned crew claimed damages against the shipowners.

[400] The crew did not receive a fixed wage or salary but instead received a share of the proceeds of sale of the catch from any particular fishing trip.

[401] The Court of Appeal adopted the Scottish view after undertaking an exhaustive review of a number of decisions of the Scots, Irish and Canadian courts concerned with distinguishing contracts of service and contracts for services. See, *Scottish Insurance Commissioners v. M'Naughton*, 1914 S.C. 826; *Nobel v. Osprey Trawlers Ltd.*, 1998 S.C. 835.

intended to cover claims arising from contracts and non-maritime torts.[402] Under the U.S limitation law, claims for "wages due to persons employed by...shipowners" are the only ones specifically excluded from the application of limitation of liability.[403] The legislative history as well as the congressional purpose to encourage American shipping seemed to have indicated that all losses, whether based on tort or contract, would have been subject to limitation. However, later on, with the gradual hostility to the limitation regime, the U.S. court had developed its peculiar "personal contract doctrine", which essentially holds that limitation privilege is unavailable to an owner or bareboat charterer for liability under a personal contract.[404]

The personal contract doctrine was originally derived from the decision of *Richardson v. Harmon*[405] by the Supreme Court in 1911, in which the court stated that the Limitation of Liability Act limited the owner's risk to his interest in the ship in respect of all claims but left him "liable for his own fault, neglect and contracts". The doctrine was widely applied in the subsequent judicial interpretation to exclude the application of limitation of liability in certain types of claims, and used as an effective means to circumvent limitation of liability.

The doctrine had been initially applied to contracts requiring payment for repairs, supplies, and services rendered. Subsequently, the U.S. court has extended the application of the doctrine further to other contracts such as voyage, time, and bareboat charters, both oral and written to deny the right to limitation.[406] Typically, an owner cannot limit against a claim by a charterer for the breach of obligations contained in a charter party. For example, in *Pendleton v Benner Line*,[407] there was a warranty of seaworthiness in the charter party. Therefore, even though the owners did their best to make the ship seaworthy and even though the failure to make the ship seaworthy was wholly without the privity or knowledge of the owners, they were held liable for the breach of the warranty contained in such a personal contract without the benefit of limitation. Similarly, in *The Carla*, it was held that when a shipowner personally warranted the seaworthiness of the vessel, the owner had made a personal contract and was not entitled to limitation under the Limitation Act. Accordingly, the slot charterers' indemnity claims against bareboat charterers were based on personal contract and therefore not subject to limitation under the Act. Where the duty to provide a seaworthy vessel derives from a "personal contract", limitation may be denied on that basis alone, thus no privity or knowledge inquiry is necessary to defeat limitation.[408]

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[402] This provision was originally enacted by Congress in 1884 and later codified as section 189.

[403] 46 U.S.C. 189

[404] For discussions of personal contract doctrine, see generally, Crowe, *Kinds of Losses Subject to Limitation: The "Personal Contract" Doctrine,* 53 Tul. L. Rev. 1087 (1979); Castles, *The Personal Contract Doctrine: An Anomaly In American Maritime Law*, 62 Yale L.J. 1031 (1953).

[405] 222 U.S. 96 (1911).

[406] See, e.g., *Cullen Fuel Co. v. W.E. Hedger, Inc.*, 290 U.S. 82 (1933); *Capitol Transp. Co. v. Cambria Steel Co.*, 249 U.S. 334 (1919); *Luckenbach v. W.J. McCahan Sugar Refining Co.*, 248 U.S. 139 (1918); *Pendleton v. Benner Line*, 246 U.S. 353 (1918); *The Nat Sutton*, 62 F.2d 787 (2d Cir.), modified on rehearing, 63 F.2d 1021 (2d Cir. 1933).

[407] *Pendleton v Benner Line,* 246 U.S. 353 (1918)

[408] See *Coryell v. Phipps*, 317 U.S. 406, 410, 1943 AMC 18, where the court stated "we are not concerned here, however, with the question of limitation of liability where the loss was occasioned by the unseaworthiness of the vessel. The Limitation Act has long been held not to apply where the liability of the owner rests on his personal contract."

Interestingly, while charter parties are consistently considered as personal contracts and the claims arising out of them are generally excluded from limitation, it is established that bills of lading for carriage of goods by sea are generally not taken as personal contracts as they are usually regarded merely as ship's documents and accordingly claims arising thereunder are held to be subject to limitation of liability.[409]

Certainly, not all contracts are regarded as "personal" for limitation purposes. The U.S. jurisprudence has indicated that there exist two major different approaches in defining and applying the doctrine. The first one is the "making rule", where the determinative criterion is the making or signing of the contract. The contract would be considered personal to a shipowner if the shipowner executed the contract personally, and in the case of corporations, it would mean that the contract is made or signed by a corporate officer or a managing agent, or the contract is made under the direct supervision or control of the owner. The other approach, known as the "breach rule," focuses upon the nature and terms of the particular contract and the relation of the owner to its breach of the contract.[410] This approach originated in the decision of *The Soerstad*[411] which involved a towage agreement, and has been followed by a number of subsequent cases.[412] After *The Soerstad* decision, the scope and effect of the personal contract doctrine have been principally restricted to those contracts containing warranties, whether express or implied, such as the warranty of seaworthiness in the charter party and contracts for the private carriage of goods (e.g. lighterage contracts).

As a matter of fact, the personal contract doctrine is basically judge-made law without any supportive language in the statutes. Although the doctrine has been severely criticized, it is a firmly established restriction of the shipowner's limitation privileges. Ambiguity of this doctrine has generated confusion and creates risks of undermining the purposes of the limitation regime to protect parties involved in the shipping industry.[413] It is noteworthy that the U.S. jurisprudence has shown that the courts did, on their own initiative, narrow the scope of the personal contract doctrine and allow limitation in the full spirit of the Act.[414]

Conclusion

There are certain types of claims explicitly excluded from limitation by Conventions

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[409] See, e.g., *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932); *Americana Tobacco Co. v. Goulandris*, 173 F.Supp. 140 (S.D.N.Y. 1959), aff'd 281 F.2d 179. Limitation of liability in cargo claims may be governed by global limitation regime as well as specific liability regimes for carriage of goods by sea.

[410] For a discussion of the "making rule" and "breach rule", see Rae M. Crowe, *Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine*, 53 Tul. L. Rev. 1087, 1095-1101 (1979).

[411] 257 F.130 (S.D.N.Y. 1919).

[412] See, e.g., *The E.S. Atwood*, 289 F.237 (2d Cir. 1923); *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981), 1982 AMC 2603; *Cullen Fuel Co. v. W.E. Hedger, Inc.*, 290 U.S. 82 (1933); *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd*, 287 U.S. 420 (1932); *W.R. Grace & Co. v. Charleston Lighterage & Transfer Co.*, 193 F.2d 539 (4th Cir. 1952)

[413] Indeed, unilateral repeal of the Limitation Act or unjustifiable restriction of its scope and application by the judiciary could adversely affect American owners by causing a disproportionate increase in insurance premiums.

[414] See *South Carolina State Highway Dep't v. Jacksonville Shipyards, Inc.*, 1976 AMC 456, 467-68 (S.D. Ga. 1975). However, the limitation statute is the law and should be applied by courts, not in any grudging spirit, but in a manner consonant with its original purpose. If the statute is to become a dead letter, it should be made so by legislative action and not by unsympathetic judicial application.

or various national legislations as well as by case law. Under the 1957 Convention, claims for salvage or general average contribution and claims arising from contract of service are excluded. The 1976 Convention has further excluded claims for oil pollution damage and claims for nuclear damage from global limitation of liability, because these types of claims are covered by special and separate international limitation regimes. International efforts have proved to be successful on the whole in establishing the CLC/Fund regime to govern the liability and limitation for oil pollution claims. The CLC/Fund regime has also provided a good base for drafting the HNS Convention which governs claims arising from damage by HNS substances. For bunker oil claims, the Bunker Oil Convention will come into force soon.

To date, the global limitation together with the special limitation regimes establish a comprehensive regime for limitation of liability to ensure that in most cases claimants will receive adequate compensation. Indeed, the establishment of these special and separate liability and limitation regimes for certain damage has greatly increased the chances for the global limitation regime to remain vital since much dissatisfaction with the limitation system came from extremely high marine pollution damages.

With respect to domestic laws, both the U.K. and Chinese limitation laws have adopted virtually the same provisions as found in the 1976/1996 Convention. As such, the U.K. government has ratified the CLC and Fund Conventions, as well as the 1996 HNS Convention and the 2001 Bunker Oil Convention.

Under the Chinese legal regime, China has only adopted the CLC Protocol 92, but not the complementary Fund Convention yet. It is expected that some domestic compensation regime for oil pollution damage will be established soon by reference to the framework of the CLC/Fund regime. Therefore, in China, international conventions and the domestic regime will be co-existing and constitute the overall compensation regime for oil pollution damage. China has not ratified the Bunker Oil Convention or the HNS Convention. It is anticipated that China will establish its own domestic compensation regime for hazardous and noxious substances by reference to that for oil pollution compensation.

In the U.S., the government chose to remain outside the international scheme governing pollution damage. Instead, it has adopted its own domestic legislation in this domain, such as the Oil Pollution Act of 1990 and the CERCLA 1980. The U.S. jurisprudence has played a significant role in interpreting claims excluded from limitation, since the U.S. courts have developed their peculiar "personal contract doctrine" to restrict the owner's right to limit. This doctrine is basically judge-made law. It thus seems advisable for the U.S. Congress to amend or reenact its limitation law by reference to the 1976/1996 Limitation Convention, so as to clearly delineate the precise types of claims subject to limitation and excluded from limitation and thereby abolish the personal contract doctrine for the certainty of law.

Chapter Five Conduct Barring Limitation

Introduction

For the person liable to benefit from the privilege of limitation of liability, he must be within categories of persons entitled to limit (e.g. shipowners) and the particular claim is established to be subject to limitation of liability. Furthermore, there is another very important criterion to determine whether the person concerned is entitled to limit his liability, i.e. his own conduct.

Up to now, there exist mainly two tests on conduct barring limitation.[415] The old one was typically found in the 1957 Limitation Convention, that is, limitation was available for the shipowners in respect of certain claims except where the occurrence giving rise to the claim resulted from the "actual fault or privity" of the owner.[416] This test was quite notorious for its ambiguity in interpretation and there have been numerous cases dealing with it. The U.K. adopted this test prior to adopting the 1976 Limitation Convention.

However, under the old test, there had been a number of cases indicating the general judicial prejudice against the limitation regime (mostly arising from dissatisfaction with the insufficiency of the limitation fund), as resulted in shipowners losing the right to limitation very frequently. Not surprisingly, there was an outcry to introduce a new Convention and a new test. Hence, the new test was introduced in the 1976 Limitation Convention, under which it requires loss or damage resulting from the "personal act or omission" of the person liable for the loss which was "committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".[417] The almost unbreakable nature of the right to limit was a trade-off for the considerably higher limits introduced by the 1976 Convention.

The old test and the new test have been adopted respectively in various jurisdictions around the world. Currently, both the U.K. and China have adopted the new test in their maritime legislations despite some difference in judicial interpretations. The U.S. is not a contracting state to any limitation Convention and provides a very different limitation regime based on the ship's value. However, in respect of the criteria to enjoy the benefit of limitation, the wording as provided in the Limitation Act is quite similar to that of the 1957 Convention. According to the Act, an owner of a vessel is only entitled to limit liability for loss or damage which has been incurred without the privity or knowledge of the owner.[418]

This chapter will focus on the interpretation and application of the two tests on

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[415] The test contained in the 1924 Limitation Convention, i.e., limitation does not apply "to obligations arising out of acts or faults of the owner of the vessel", is not under discussion within this chapter due to its very limited application.

[416] See Article 1(1) of the 1957 Convention

[417] See Article 4 of the 1976 Convention

[418] 46 U.S.C. 183 (a)

conduct debarring the right to limitation under the Conventions and the laws of the relevant countries. Since there are basically two tests on conduct debarring limitation, the structure of this chapter is different from the previous chapters. The discussion will be taken under the old the test and the new test respectively. The position under the U.K. law prior to adoption of the 1976 Convention and the U.S. law will be explored under the old test; while the position under the current U.K. law and the Chinese law will be discussed under the new test.

5.1 Under the Old Test

The term "actual fault or privity" imposed by the 1957 Convention and "privity or knowledge" by the United States Limitation Act has been defined and explained at many occasions. Despite a slight difference of the terms, both standards have been generally regarded as carrying more or less the same meaning and remarkably similar in their ambiguity due to a lack of convincing and consistent methodology for the legal interpretation. It was noted that the concepts are "empty containers into which the courts are free to pour whatever content they will."[419] Thus, judicial interpretations of these terms are highly important. Unfortunately, the interpretations were largely influenced by the judicial attitude to the limitation system at the time. Again, the U.S has long been well known for its hostility to the limitation regime and hence inclined to deny the right to limitation by applying this test.

5.1.1 Privity

The term "privity" appears both in the 1957 Convention and the U.S. Limitation of Liability Act. The definition of the term could be found in a number of judicial interpretations. Privity generally means some personal participation of the shipowner in the fault or negligence that caused or contributed to the loss or injury.[420] It includes not only those situations where the wrongdoer was aware of and compliant with that other fault, but also those cases when he "willfully shut his eyes" to the circumstances in question.[421]

In *The Eurysthenes,*[422] it was held that "privity" meant "with knowledge and consent". If one is "privy" to something this means, generally speaking, that one has certain knowledge, either confidential or otherwise, of some relationship or agreement or situation existing between two or more other people. For instance, in *Mo Barge Lines,*[423] it was held no privity was shown where the fault was that of the vessel's pilot, who was licensed, experienced and not negligently chosen. The pilot's negligence in mistaking a meeting vessel as a fixed group of constriction lights as a result of not using the radar was not the consequence of any failure in equipment of the vessel or of the owner's duty of instruction. The owners lacked knowledge or privity of the pilot's negligent piloting and therefore were granted limitation of liability.

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[419] G. Gilmore & C. Black, *The Law of Admiralty*, § 10-20 (2nd. ed. 1975)

[420] See *Coryell v. Phipps*, 317 U.S. 406, 411, 1943 AMC 18, 22.

[421] See also, *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir. 1988); *Zeringue v. Gulf Fleet Marine Corp.*, 666 F. Supp. 860 (E.D.La. 1986); *Keller v. Jennette*, 940 F. Supp. 35 (D. Mass. 1996); *Moeller v. Mulvey*, 959 F. Supp. 1102 (D. Minn. 1996).

[422] (1976) 2 Lloyd's Rep. 171.

[423] 2004 AMC 693

As to knowledge herein, it has been generally acknowledged that "actual knowledge" is not necessarily required; "constructive knowledge", which means something that the person liable ought to have known, even if he did not in fact know it, is sufficient to satisfy the required test of "actual fault or privity".[424] Indeed, the test is an objective one, it is not to see whether a particular shipowner was actually aware of any negligence, but rather to consider what a reasonably prudent shipowner in a comparable situation should reasonably be aware of in the management and control of his vessel.

5.1.2 Actual Fault or Privity

There are plenty of cases dealing with the words "actual fault or privity". In an authoritative British case *Asiatic Petroleum Co. v. Lennard Carrying Co. Ltd.*,[425] the words "actual fault or privity" were defined as "… infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents".[426]

When the shipowner is an individual, it is not difficult to identify whose actual fault or privity is that of the shipowner. Nevertheless, when it comes to corporate shipowners that present various forms such as those large shipping organizations, subsidiary companies, consortia, etc. in modern times, it is not an easy task to identify whether the actual fault or privity is that of the shipowner himself or somebody identified as speaking for and acting as the shipowning company itself or whether it is that of the servant or agent of the shipowner.[427] For that purpose, the concept of "*alter ego*" has been developed to solve this problem and followed in many jurisdictions as was demonstrated in a number of cases.[428]

As stated by the court in *The Lady Gwendolen,*[429] to determine who was the *alter ego*

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[424] See Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, at p. 385. Similarly, in *Brister v. A.W.I., Inc.*, 946 F.2d 350 (5th Cir. 1991), rehearing denied, 949F.2d 1160, it was held that demonstrating lack of actual knowledge by the vessel owner was not sufficient to show lack of "privity or knowledge". "Privity or knowledge" is deemed to exist if the shipowner has means of obtaining knowledge or if he would have obtained the knowledge by reasonable inspection. In other words, "knowledge" is not only what the shipowner knows, but what he is charged with discovering.

[425] (1915) A.C. 705.

[426] The judge further stated, "… the words "actual fault" are not confined to affirmative or positive acts by way of fault. If the owners be guilty of an act or omission to do something which he ought to have done, he is no less guilty of an "actual fault" than if the act had been one of commission. To avail himself of the statutory defence, he must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission to do so may be a fault, and, if so, it is an actual fault and he cannot claim the protection".

[427] See Christopher Hill, *Maritime law*, London: L.L.P., 5th ed., 1998, at p. 378.

[428] E.g., *Beauchamp v. Turrell* [1952] 1 Lloyd's Rep. 266; *The Norman* (1960) 1 Lloyd's Rep. 1; *The Anonity* [1961] 2 Lloyd's Rep. 117; *The Lady Gwendolen*; (1965) 1 Lloyd's Rep. 335; *The Dayspring* (1968) 2 Lloyd's Rep. 204; *The England* (1973) 1 Lloyd's Rep. 373; *The Chugaway 2* (1973) 2 Lloyd's Rep. 159; *The Kathy K* (1972) 2 Lloyd's Rep. 36, (1976) 1 Lloyd's Rep. 153; *The Marion* (1984) 2 Lloyd's Rep.1; *The Ert Stefanie* (1989) 1 Lloyd's Rep. 349.

[429] (1965) 1 Lloyd's Rep. 335, the assistant managing director of a brewing company who, although not specifically authorised by resolution to act in the board's name, was held to be the *alter ego* of the company in matters of ship management. Furthermore, the shipowner could not prove that the collision

of the particular shipowning company so that his fault or privity can be attributed to that of the company itself, it was essential to find out who was the directing mind and will behind the voyage in question. Similarly, in *The Chugaway II,*[430] the court held that for limitation purpose, it was necessary to figure out firstly whose action is the very action of the company. Thus, efforts have to be taken to distinguish between the vicarious and the direct liabilities of the shipowning company. Courts generally agreed that the knowledge of directors or key officers is imputed to the corporation; however, they differed as to the effect of knowledge acquired by other employees. The decision on whether to impute knowledge acquired by such employees turned on the facts of the particular case and was contingent on the specific legal regimes involved.

The search for the *alter ego* of the company has not proceeded consistently but subject to evolution. It largely depends on the domestic judicial attitude towards the limitation regime at the time. The U.K. case law indicated that there seemed to be a shift from originally taking the title or position of an individual in the executive hierarchy of a corporation as an important determinative factor,[431] towards taking effective management or control as essential element to determine if a shipowner was to successfully limit under the "actual fault or privity" test.

In most of the earlier cases dealing with limitation of liability, it was assumed that shipowners sufficiently discharged their responsibilities by appointing a competent master and thereafter leaving all questions of safe navigation entirely to him, including obtaining all necessary charts and other nautical publications. Under this approach, the shipowning company would be very often insulated from its liability arising from the management of the vessel, and consequently could be easier to enjoy the benefits of limited liability.[432]

This earlier approach had been outdated from around the 1960s, as indicated by a line of subsequent cases. The shipowners' duty had since then been extended to cover the supervision and control of daily activities. In most of the later cases, the shipowners were denied a right to limitation because they had indeed done little or insufficiently in this respect. For instance, in *The Norman*,[433] the shipowners were deprived the right to limitation due to the fault of a failure to pass on new information relating to inadequately charted waters off Greenland. This decision had redefined the extent of the managerial duties of owners and managers, especially in relation to the supply of navigational information and publications to their vessels.

This approach was more clearly illustrated by the subsequent decision in *The Lady Gwendolen*. In that case, the relevant assistant managing director, a brewer by experience, took no interest in navigational matters and the master of the Guinness ship had not been properly instructed in the use of radar. It was observed by Sir Gordon Willmer: "... any company which embarks on the business of shipowning

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which resulted from the vessel's excessive speed in fog took place without their actual fault or privity, consequently he was denied limitation of liability.

[430] [1973] 2 Lloyd's Rep. 159

[431] See, e.g., *Lennard's Carrying Co. v. Asiatic Petroleum Co* [1915] A.C. 705.

[432] See generally, Michael Thomas, *British Concepts of Limitation of Liability*, 53 Tul. L. Rev. 1205, (1979).

[433] [1960] 1 Lloyd's Rep. 1

must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation."[434] As such, this relatively new approach replaced the earlier approach to tackle the issue of "actual fault or privity" of shipowners in contested limitation actions.

In a very significant case *The Marion,*[435] Sheen J at the admiralty court had tried to follow the earlier approach in holding that "actual fault" of a corporation meant a fault of a member of the board of directors, unless there was some other person who had authority to co-ordinate with the board of directors given to him under the articles of association and appointed by a general meeting of the company. The manager at fault was not the directing mind of the company. Therefore, his acts were not the personal acts of the company itself. However, this decision was overruled by the court of appeal and the House of Lords. It was held that the manager's fault was, as a matter of law, the actual fault of the shipowners. The owners' fault or privity consisted in their failure to maintain effective supervision. Although the owners had also exercised supervision in various ways, the supervision was not adequate in the circumstances. The case laws revealed the courts' standpoint that a shipowner had to ensure efficient management and control of his ships if he intended to enjoy statutory right to limitation. Thus, where measures of supervision and control have been sufficiently exercised, such as in *The Garden City*,[436] the owners would normally be granted the right to limit.

Under the latter approach, the shipowners, in order to benefit from limitation of liability, had to carry out certain duties related to equipping the ship and navigational matters. Obviously, it is easier to attribute the "actual fault or privity" of an individual at a lower level of the company's hierarchy such as the delegated manager to that of the shipowner itself. As a result it would be harder for the shipowners to enjoy the benefit of limitation.[437] The shift of the approaches applicable to the standard of conduct debarring limitation reflected the somewhat hostile attitude of the U.K. courts at the time to the right to limit before adoption of the 1976 Convention, which mostly arose from the dissatisfaction with the unfairness brought by the low limits to the claimants as provided in the 1957 Convention.

Navigational errors or other negligence committed by master or crew, in the course of their duties, did not in themselves give rise to actual fault or privity on the part of the shipowner. The key factor which distinguished the directing mind from other employees was the capacity to exercise decision-making authority in matters of corporate policy, rather than merely to give effect to such policy on an operational

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[434] See *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, 346. See also *The England,* [1973] 1 Lloyd's Rep. 373

[435] [1984] 2 Lloyd's Rep. 1. In this case, the ship's assistant operation managers failed to ensure that the ship was equipped with adequate up-to-date charts on board. In consequence of using an obsolete chart which had been allowed to remain on board, the vessel's anchor fouled an oil pipeline on the seabed.

[436] [1982] 2 Lloyd's Rep. 382

[437] Not surprisingly, shipowners had been rarely granted a limitation decree in a contested limitation action in the U.K. under the 1958 Merchant Shipping Act. The practical result of this is that many shipowners preferred to settle claims at a sum in excess of their limitation fund rather than risk a contested limitation action. See C. N. Cheka, *Conduct barring limitation,* 18 J. Mar. L. & Com. 487 (1987); Robert Grime, *Breaking limitation*, Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton

basis, whether at head office or across the sea.[438] As found in *The Ert Stefanie,*[439] where the blameworthy act was committed by someone not on board, who occupied a senior managerial position, the nature of the functions which he performed had to be examined to discover whether it was of a type which, but for delegation, would have fallen within the competence of the directors.

Case law of other countries that essentially adopted the "actual fault or privity" test has revealed the same line of reasoning. For instance, in the Canadian case *The Westminster Tyee,*[440] it was stated that while it was not for the shipowner to interfere with the direction of the master in controlling his vessel, it was a different matter when any question of policy was involved in which the owner realized or should have realized that there was an implicit effect or potential effect on the safety of his vessel or other property. Since there was a failure in the efficient management of the tug, the owners were not entitled to limit their liability.

In another Canadian case *The Sea Cap XII,*[441] the management had issued no instruction either orally or in writing regarding the operation, inspection or maintenance of the winch. Therefore, neither the captain nor the crew were aware of the correct method of operating the winch and were unable to say when it had last been inspected. The owners had done nothing to discharge their normal supervisory duties and accordingly were denied limitation of their liability for the collision.

In an Australian case, *Alstergren v. Owners of the Ship Territory Pearl,*[442] the owners were held to be guilty of actual fault or privity, since they had actual knowledge of the master's tendency to work excessive hours, but neither installed any equipment, such as radar alarms, to protect against the possibility of the master's falling asleep, nor exercised sufficient supervision over the master's work practices. While in *The Tiruna,*[443] it was held by the Australian Supreme Court that the collision was caused by the personal failure of the master of the negligent vessel to keep a proper lookout, the shipowner had disproved that the occurrence giving rise to the claim resulted from actual fault or privity on its part and were therefore entitled to the benefit of limitation of liability.

In a South African case *Atlantic Harvesters of Namibia Ltd. v. Unterweser Reederei G.m.b.H. of Bremen,*[444] it was found that the grounding of the vessel was a consequence of weakness in the towline and unsuitability of the emergency line for

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[438] See *The Rhone v. Peter A. B. Widener*, [1993] 1 Lloyd's Rep. 600. The court observed that a master should not be easily identified as the directing mind of the company by virtue of the fact that he exercised some discretion and performed some non-navigational functions as an incident of his employment.

[439] [1989] 1 Lloyd's Rep. 349

[440] The issue was whether the damage arose from an unforeseen navigational error (crane boom of unusual height on the tow striking the bridge) on the part of the tugmaster or actual fault on the part of the tugowners. At the time the voyage commenced, neither the master nor his employer had actual knowledge of the precise height of the tow. That was something management was obliged to see to before allowing the tug and tow to proceed. After the accident, the owners established a clear policy to the effect that all tows were to be inspected by qualified staff for clearances and suitability for towing.

[441] Lloyd's Maritime Law Newsletter 0232.

[442] (1992) 36 F.C.R. 186

[443] [1987] 2 Lloyd's Rep. 666

[444] [1987] Lloyd's Maritime Law Newsletter 0194, the tug *Luneplate* was to tow the vessel *St. Padarn* under the towage agreement, however, during the journey, the vessel ran aground when the two parted.

the purpose of the tow. The system of management and supervision devised by the shipowners was not reasonably efficient in that it not only failed to guard against that which was reasonably foreseeable, but also against something known to have happened in the past under the same system and which should have been foreseen. Actual fault or privity on the part of the shipowners had been shown based on their lack of instructions and supervision concerning the inspection, fitness and actual use of the towlines. Consequently, the owners were not entitled to limit their liability.

5.1.3 Privity or Knowledge

Section 183(a) of the U.S. Limitation Act provides that an owner of a vessel is only entitled to limit liability for loss or damage which has been incurred without the privity or knowledge of the owner. To determine whether shipowners are entitled to limitation under the "privity or knowledge" test,[445] the case law has indicated that the emphasis is often placed upon the virtual power and responsibility of an individual in supervising the management and control of the vessel. In other words, it was the extent of the employee's responsibility, not his title, that determined whether limitation was available. This is much the same as the latter approach adopted by the U.K. courts. Consequently, "privity or knowledge" is often found at a lower level in the company's hierarchy, which means the shipowner's right to limitation can be easily defeated.[446] Courts generally agree that the negligence of an executive officer, manager or superintendent, whose scope of authority includes supervision over the phase of the business from which the loss or damage occurred, is sufficient to deny limitation. Indeed, the U.S. courts take a relatively liberal attitude when interpreting the standard for breaking limitation of liability, which once again revealed the U.S. judiciary's long-standing dislike of the limitation regime.

For example, in *Continental Oil Company v. Bonaza Corporation*,[447] the vessel captain was held not just a master, but also a managing agent of the corporation with respect to the field of operations in which the negligence occurred, because his authority delegated by the corporation was quite expansive in the management of the vessel. Therefore, his privity or knowledge was attributed to that of the corporation.[448]

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[445] As used in the statute, the meaning of the words 'privity or knowledge,' evidently, is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. See *Lord v. Goodall,* 15 F. Cas. 884, 887 (D. Cal. 1877) (No. 8,506), aff'd, 102 U.S. 541 (1881).

[446] See, e.g, *Baldassano v. Larsen*, 580 F.Supp.415, 1985 AMC 2527 (D.Minn. 1984); *Illinois Constructors Corp. v. Logan Transp., Inc.,* 715 F.Supp.872 (N.D.III, 1989); *American Dredging Co. v. Lambert,* 81 F.3d 127 (11th Cir. 1996); *Zeringue v. Gulf Fleet Marine Corp.*, 666 F. Supp. 860, 1988 AMC 1694 (E.D.La. 1986); *Patton-Tulley Transp. Co. v. Ratliff*, 797 F.2d 206 (5th Cir. 1986); *In re Ingoglia*, 723 F.Supp. 512, 1990 AMC 357 (C.D.Cal. 1989). See Schaar, Jill A., *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Tul. Mar. L.J. 659, 692-701 (2000)

[447] 706 F.2d 1365, 1983 AMC 2059 (5th Cir. 1983)

[448] In contrast, in *Cupit v McClanahan Contractors Inc*, 1 F.3d 346 (5th Cir. 1993), the tool pusher who was in charge of a drilling rig was held not to be a managing agent due to his limited authority. While the tool pusher had authority over operations on the rig, he lacked the managerial or corporate authority to bind the company in the same manner as the drilling supervisor or the president of the company. As a result, the owner was entitled to limit his liability because he lacked privity or knowledge.

Similarly, in *Complaint of Waterstand Marine*,[449] the court found that a pilot's inability to operate an Automatic Radar Plotting Aid rendered him incompetent, and the shipowner's failure to train the captain on how to use the equipment rendered him liable for the damages at sea. The incident was not a navigational error, but rather an example of unseaworthiness. Therefore, the shipowner was disqualified from the protection of limited liability.

As far as the responsibilities of a particular person are concerned, in *In re Hellenic, Inc.*,[450] the United States Court of Appeals for the Fifth Circuit provided a number of relevant factors when examining what constitutes "owner's privity or knowledge." That is, (1) the scope of the agent's authority over day-to-day activity in the relevant field of operations; (2) the relative significance of that field of operation to the business of the corporation; (3) the agent's ability to hire or fire other employees; (4) his power to negotiate and enter into contracts on behalf of the company; (5) his authority to set prices; (6) the agent's authority over the payment of expenses; (7) whether the agent's salary was fixed or contingent; and (8) the duration of his authority (i.e. full-tie or restricted to a specific shift). Bearing those factors in mind, the court found that, as the superintendent could not make basic business decisions for the company despite he might have possessed significant power over the management of an individual job, his position was not sufficiently high on the corporate hierarchy so as to impute his knowledge to the company.

Speaking of taking effective supervision and control by shipowners for limitation purposes, the owner's duty is essentially satisfied when he properly equips the vessel and selects a competent crew to operate her. Breach of such duties by shipowners may result in loss of right to limitation of liability. As a general rule, navigational error of the master and crew members do not deprive shipowners of their right to limitation if the shipowners can prove lack of privity or knowledge on their part. However, if the navigational errors which caused loss or damage resulted from the incompetence of the crew or improper equipment of the vessel, the shipowner would run the risk of being denied the right to limitation.

For instance, in *Trico Marine Assets, Inc. v. Diamond B Services Inc.*,[451] two vessels collided head-on in dense fog, the court allowed one vessel to limit its liability since it was found there were no statutory violations of navigation rules, and even if there were, the collision was unavoidable because of the many negligent actions of the other vessel. The court denied the other vessel the right to limitation, because she failed to employ a lookout, failed to train the master in the use of the radar, failed to employ a safety manager or provide safety training, and failed to evaluate the competence of the master. Additionally, the court found it important that the owners were aware of some of the problems, such as the excessive noise of the engine which would drown out another vessel's fog whistle signals, and that the owners did not ensure the master's familiarity with the vessel's radar system.

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[449] 1991 AMC 1784 (E.D. Pa. 1988)

[450] 252 F.3d 391, 2001 AMC 1835 (5th Cir. 2001). In this case, the key issue was whether a construction superintendent's decision to leave a spud barge unmanned, which later struck an offshore pipeline, could be imputed to the owner. See Jason A. Schoenfeld & Michael M. Butterworth, *Limitation of Liability: The Defense Perspective*, 28 Tul. Mar. L.J. 219, 241 (2004)

[451] 332 F.3d 779, 2003 AMC 1355 (5th Cir. 2003)

The decision in *Complaint of Seiriki Kisen Kaisha*[452] is also instructive with respect to the fine distinctions which can affect the right to limit liability. The court, having found both vessels at fault, correctly imposed the burden on each vessel owner to prove that the loss was incurred without its privity or knowledge. One vessel owner was denied the right to limit his liability on the ground that he failed to sustain his burden of proving the competency of the vessel's mate on watch. The relevant factors to consider included such as whether holding a qualified license, whether there were regular supervisions of the crew, and whether the crew was hired pursuant to proper interviews to evidence its navigational competence and good potential. The other vessel owner was granted the right to limit because he had sustained his burden.

It was further indicated in this case that, for limitation of liability purposes, the owner would be unable to take refuge in the argument that the incompetence of a crew member was without the owner's privity or knowledge because the owner had selected a reputable manager to perform that selection task. Furthermore, crew selection is more than just the hiring of competent seamen. There must be a check-up system on these employees and making sure that they are following relevant instructions.

5.1.4 Master/Owner

5.1.4.1 Under the 1957 Convention

Under the 1957 Limitation Convention, the right to limit available to a master or crew member was also available to an owner acting in that capacity.[453] To be specific, when the person liable acts as both the owner and master of the vessel, he has to prove that his negligent acts or omissions are performed while he was acting purely in his capacity as master, but not as owner, whether or not there was actual fault or privity.[454] For instance, in *The Annie Hay,*[455] it was held that the owner of *Annie Hay* was entitled to limit since the collision with the yacht arose out of his negligence when he was acting as master and in sole charge of navigation.[456] There is no such equivalent provision in the 1976 Convention. Actually it is unnecessary to make such distinction because Article 1 of the 1976 Convention has already granted the right to limitation to a much greater scope of people.

Indeed, the question of capacity in which an owner/master was acting at the time was a matter of fact. The applicability of the limitation provisions depends on the function he was actually carrying out instead of on a person's formal designation.[457] As stated in *The Alastor,*[458] "capacity" meant if it is what an owner or engineer or master

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[452] 629 F.Supp. 1374, 1986 AMC 913 (S.D.N.Y. 1986)

[453] See Article 6(3) of the 1957 Convention.

[454] See, e.g., *Walithy Charters Ltd.v. Doig,* [1979] 15 B.C.L.R.45, where the Supreme Court of British Columbia stated "...notwithstanding the fact that the owner could not limit his liability because of a finding of fault and privity on his part, the limitation provisions extended to any person acting in the capacity of master or member of crew of the ship... whether with or without his actual fault or privity, and were therefore available to an owner acting in this other capacity".

[455] [1968] 1 Lloyd's Rep. 141.

[456] See also, e.g., *Nguyen v. Le*, (1997) 42 B.C.L.R. (3d) 135, where an injured passenger brought suit in tort against the master/owner of a fishing vessel after he fell from the vessel and was struck by its propeller.

[457] See *Whitbread v. Walley,* (1988) 26 B.C.L.R. (2d) 203 (B.C.C.A).

[458] [1981] 1 Lloyd's Rep. 581.

usually does. Failure to check the split pin was therefore a fault of the person liable in the capacity as master or chief engineer and not as owner of the vessel.

The negligent vessel owner could not limit his liability merely because he is also the master of the vessel. Thus, in *Stephenson v. Poyner,*[459] since the helmsman knew that he, as master, was operating the boat negligently, therefore there was "actual fault" on his part as owner. Similarly, in *Kaufman et al v. Vaccher and the ship Blue Waters,*[460] it was held that the owner's act of engaging inexperienced seamen on watch alone was a negligent act in his capacity as owner, not as master, and his error in over-estimating their competence as seaman was a fault precluding him from enjoying the limitation provisions of the Canada Shipping Act. Likewise, in *Conrad v. Snair,*[461] the court held that the owner/master was at fault as owner inasmuch as he knew of his own tendency to recklessness, of the presence of the sailboat and because he had permitted himself to operate his vessel after drinking. Having failed to show that his conduct as owner was without actual fault or privity according to the objective standard of an ordinary, reasonable shipowner, the owner could not enjoy the limitation of liability he might have enjoyed had he been only a negligent master.

5.1.4.2 Under the U.S. Law

Generally speaking, the privity or knowledge of the master and crew members can not be imputed to that of the shipowner. Nevertheless, under the U.S. limitation law, as far as the master is concerned, there is an exception to this general rule. By virtue of Section 183(e) of the Limitation Act, in respect of claims for personal injury and death, the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent, at or prior to the commencement of each voyage, shall be deemed conclusively that of the shipowner. The intent of Congress in enacting Section 183(e) was to enlarge the type of persons whose privity or knowledge would bind the owner and thus prevent limitation of liability.[462] Notably, this exception refers specifically to "seagoing vessels".[463] And it does not expand the shipowner's privity or knowledge in the case of property damage. In addition, this exception applies only to privity or knowledge at or prior to the commencement of the voyage and does not affect those cases involving navigational error or perils of the sea.[464]

Hence, to deny limitation of liability for personal injury/death claims, the negligence which caused the loss need not have been within the privity or knowledge of the

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[459] (1998) 56 O.T.C. 269 (Ont. Ct. (Gen. Div), per Borkovich, J)

[460] [1980] 30 NR 91. The owner of a fishing vessel left two inexperienced seamen in charge while he slept. He was awakened when his vessel collided with another.

[461] (1995) 146 N.S.R. (2d) 321; (1995) 422 A.P.R. 321; (1996) 131 D.L.R. (4th) 129 (N.S.C.A), where a collision took place at night between a Boston whaler and an anchored unlit sailboat, injuring a passenger on board the Boston whaler. The master of the Boston whaler was found to be entirely at fault for the collision, because he had been proceeding at an excessive speed and had failed to maintain a proper lookout.

[462] Thus, the privity or knowledge of the superintendents and managing agents could result in defeating limitation in property damage claims under section 183(a) and personal injury/death claims under section 183(e). See, e.g. *In re The Republic of France*, 171 F.Supp. 497 (S.D.Tex. 1959), where limitation was denied under both sections.

[463] As to the definition of seagoing vessels, please refer to Section 183(f) of the Limitation Act and Chapter 1 of this thesis.

[464] See, e.g., *Farrell Lines, Inc. v. Jones*, 530 F. 2d 7 (5th Cir. 1976), where it was held that the fault was a navigational error and not within the privity or knowledge standard under section 183(e).

seagoing vessel's owner. Rather, if the negligence was within the privity or knowledge of the master, superintendent or managing agent, limitation will be denied. Thus, in *The Mormackite,*[465] the unseaworthiness caused by improper cargo stowage was determined to be within the knowledge of the master of the vessel, but insufficient to establish privity or knowledge of the shipowning company under section 183(a). The court granted the right to limitation to the shipowners in the cargo damage claims, but denied the same in the personal injury and death claims pursuant to section 183(e).[466]

5.1.5 Causality

It should be noted here that actual fault or privity of the shipowner alone does not necessarily deprive him of the protection of limitation. The court must determine whether the fault or privity has actually caused the loss or damage in question.[467] In short, there must exist a causal connection to deny the shipowners right to limitation. For instance, in *Hammersley v. Branigar Organization, Inc,*[468] the court stated that the boat operator's competence was only material to limitation of liability if the boat was rendered unseaworty by the lack of competence on the part of the operator. Also, in *In re M/V Bowfin,*[469] the court allowed the vessel owner to limit its liability since it found the sole proximate cause of the collision was spontaneous negligent navigational errors of the master.

In *The Empire Jamaica,*[470] the ship's second officer, who happened to be the officer on the bridge at the time of the collision, was not in possession of a second officer's certificate in accordance with the relevant Hong Kong Merchant Shipping Ordinance. However, it was found that the uncertificated second officer was a fully competent seaman and his lack of certificate had no causal connection with the fact of his negligent navigation which resulted in the collision. Accordingly, the shipowners were held to be entitled to limit their liability even though they were at fault.

5.1.6 Burden of Proof

It is well-established that under both the 1957 Convention (as well as the British jurisprudence prior to adoption of the 1976 Convention) and the U.S. jurisprudence, the burden of proving what act caused the loss or damage fell on the claimant, and the onus of proving the lack of actual fault or privity with respect to loss or damage rested on the person who sought to limit his liability. That is, once the claimant established negligence or unseaworthiness, the burden shifted to the shipowner to prove that negligence was not within the owner's privity or knowledge.[471]

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[465] 272 F.2d 873 (2d Cir. 1959), reh'g denied, 276 F.2d 676 (2d Cir.), cert. denied 362 U.S. 990 (1960).

[466] See also, e.g., *Matter of Hechinger*, 890 F.2d 202 (9th Cir. 1989), the master's privity or knowledge of the unseaworthy conditions of the vessel at or prior to the commencement of voyage was deemed conclusively that of the shipowner when such conditions caused personal injury and death.

[467] *Carr v. PMS Fishing Corp.*, 1999 AMC 2958, 191 F.3d 1 (1 Cir. 1999); *Cupit v. McClanahan Contractors, Inc.*, 1994 AMC 784, 1 F.3d 346 (5 Cir. 1993); *Mac Towing, Inc. v American Commercial Lines*, 670 F.2d 543 (5 Cir. 1982)

[468] 762 F.Supp.950 (S.D.Ga. 1991).

[469] 339 F.3d 1137, 2003 AMC 2272 (9th Cir. 2003).

[470] [1955] 1 Lloyd's Rep. 50

[471] Many cases and authorities have proved this point. For instance, in *The Torenia,* [1983] 2 Lloyd's Rep. 210, it was held that the burden of proof was on the shipowners to prove the loss of the *Torenia* and her cargo was not caused by their actual fault; the same with *Atlantic Harvesters of Namibia Ltd. v.*

In order to disprove actual fault or privity as to the cause of loss or damage, the shipowner must show the cause which actually brought about the loss or damage. In doing so, he has to make effort to explore and exhaust all possibilities as to the cause of the accident and show lack of privity and knowledge as to each possibility. Otherwise, it would be very difficult for the shipowner to prove without his actual fault or privity as to the unexplained cause and he may run the risk of losing the right to limitation.[472] For example, in *Christopher v. M/V Fiji Gas*,[473] the shipowner of *Fiji Gas* was not entitled to limit its liability since he could not prove that the sole cause of the collision was a simple error in judgment or an error in seamanship by the master of the vessel. He failed to exclude the hypothesis of sleep deprivation of the master as a contributing cause of the collision, and thereby failed to discharge the onus of proving that the accident occurred without "actual fault or privity" on his part.

The burden of proof on the shipowners is obviously a heavy one; nevertheless, it does not mean that the shipowners have little chance to enjoy the limitation. Sometimes the employees of the shipowners, e.g., the master and crew very often as key witnesses in establishing fault or privity, may make false account of the accident to release themselves from responsibility. This may cause problems for the shipowner to establish his innocence. There is from time to time an inherent conflict of interests between parties involved. For example, in *The Black Bear,*[474] the master and the deck hand of the tug gave quite different accounts of the collision between the barge and the pier. Thus, the claimant sought to rely on the master's account to defeat the tug owner's limitation privilege on the ground that the failure of the throttle was attributable to a lack of proper maintenance practices and procedures to which the tug owner was privy. The tug owner sought to rely upon the account given by the deck hand to establish that there was no power failure, and the collision was attributable to an error on the master's part in his navigation of the tug. Eventually the shipowner had to provide more powerful evidence to prove that the collision was caused by a navigational error instead of failure of the tug's throttle system, so as to establish his lack of actual fault or privity.

5.2 Under the New Test

The new test for debarring the right to limit introduced by Article 4 of the 1976 Limitation Convention provides that the person liable is not entitled to limit his liability if the loss or damage resulted from his personal act or omission which was committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Compared with the old test, the new one brings the most radical change in the

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Unterweser Reederei G.m.b.H. of Bremen; American Dredging Co. v. Lambert, 81 F.3d 127 (11th Cir. 1996) and *Complaint of Consolidation Coal Co.*, 123 F.3d 126 (3d Cir. 1997). It should be noted that under the legislation giving effect to the 1957 Convention, the courts in the European continental civil law jurisdictions retained the general principle that the burden of proof lay with the claimant to demonstrate the existence of fault or privity if they sought to deprive the shipowner's right to limit liability.

[472] See, e.g., *The S.S. Hewitt,* 284 F.911 (S.D.N.Y. 1922); *Terracciano v. McAlindn Constr. Co.*, 485 F.2d 304 (2d Cir. 1973); *Martin & Robertson Ltd. v. The Barcelona*, 1968 AMC 331 (S.D. Fla. 1967).

[473] (1992) Aust. Torts Reps 81-168.

[474] [1983] Lloyd's Maritime Law Newsletter 0099

philosophy underlying the concept of a shipowner's right to limitation. As stated by Sheen J in *The Bowbelle,*[475] the purpose of the 1976 Convention was to afford shipowners, in exchange for a higher limit, an almost indisputable right to limit their liability.[476] That is, to compensate the deficiency as found in the 1957 Convention, the 1976 Convention established significantly increased limits of liability, at what were perceived to be the maximum insurable level,[477] but the entitlement to limitation of liability could only be challenged in very exceptional circumstances. Indeed, there were few examples in the jurisdictions adopting the 1976 Convention that limitation defense has been successfully challenged in the maritime context. Therefore, the ambiguity existing in the "actual fault or privity" test of the 1957 Convention and "privity or knowledge" test of the U.S. Limitation Act has been largely reduced by this new test.

The effect of the new test is that the claims set out in Article 2 of the 1976 Convention are subject to limitation of liability unless the claimant proves that the loss resulted from the personal act or omission of the shipowner committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Therefore, for the shipowner to lose his right to limit, he must be guilty of the requisite intent to cause loss or damage or degree of recklessness. Mere negligence or even gross negligence is no longer sufficient to debar the right to limitation. The court has to evaluate the gravity of the shipowner's conduct. This imposes upon the claimants a very heavy burden, as is a reversal of the former situation under the old test.[478]

The language of the new test bears a close resemblance to the comparable provisions for breaking limitation contained in several other international Conventions, such as Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (1968 Hague-Visby Rules), the United Nations Convention on the Carriage of Goods by Sea 1978 (1978 Hamburg Rules), and the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1955 (The Hague Protocol to the Warsaw Convention 1955)[479]. These provisions virtually convey identical meaning, since it is important that there should be a consistent approach to the construction of similar terms expressing similar ideas.[480]

The test under the 1976 Convention involves several elements that work together to

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[475] [1990] 1 Lloyd's Rep. 532

[476] Similarly, in *The Leerort* [2001] 2 Lloyd's Rep. 291, 295, it was observed by Lord Philips MR that "when a claims is made for damage resulting from collision, it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability."

[477] The limitation fund established by the 1976 Convention has been further increased by its 1996 Protocol (see Chapter 6 of this thesis), but the test for defeating the right to limitation remains unchanged.

[478] See *The Bowbelle*, [1990] 1 Lloyd's Rep. 532, 535.

[479] The Warsaw Convention is a widely recognized set of international rules governing the liability of an air carrier in the event of the death or injury of a passenger, loss of baggage or cargo or delay during international air transport. The Convention for the Unification of Certain Rules for International Carriage by Air 1999 (The Montreal Convention 1999, coming into force on Nov. 4, 2003), while preserving many aspects of the Warsaw Convention, updates and modernizes the Warsaw Convention, and especially features a new two-tier system of determining carrier liability.

[480] See *The Lion*, [1990] 2 Lloyd's Rep. 144, 149

make the right to limitation very difficult to defeat.

5.2.1 Personal Act or Omission

The 1976 Convention expressly provides that it is only the personal act or omission of the person liable which will defeat the right to limit. Therefore, in the case of corporate shipowners, it is still necessary to apply the *alter ego* theory to ascertain who is the directing mind and will in the hierarchy of company, i.e., whose action is the very action of the company itself.

The insertion of the word "personal", which does not appear in other conventions with similar provisions on conduct barring limitation of liability, suggests it points very specifically to the owner himself, or to the person in a corporate ownership most closely corresponding to the individual shipowner.[481] Thus, unlike the old test, under the test in the 1976 Convention, act or omission at the lower level can hardly be considered as "personal act or omission" of a shipowning company.

Effect of ISM Code on the Limitation of Liability

As we know, nowadays international society has put more and more emphasis on ensuring the safety at sea and protecting the marine environment. The shipping industry, being alerted by a series of tragic disasters,[482] has taken great effort in this respect over the years. Wherein the notable one is IMO's International Safety Management Code (ISM Code), which came into effect phased in two stages from 1st July 1998 for all passenger ships and fast ferries, tankers, bulk carriers and gas carries of more than 500 gross tons and from 1st July 2002 for all merchant ships over 500 gross tons.[483]

The ISM Code represents a set of internationally recognized principles embodying best practice in ship management. It sets out in brief comprehensible language a set of principles for ship owners and managers to adopt a Safety Management System (SMS), appoint a "designated person" with responsibility to monitor safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore-based support are applied. Moreover, the flag states are to institute a system of certification, verification and control. Flag administrations are obliged to establish recognized organizations, in many cases a classification society, to verify and certify compliance with the requirements of the Code by issuing a Document of compliance (DOC) which will be confirmed by the issue of a Safety Management Certificate (SMC) by the flag state administration.[484]

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[481] See Patrick Griggs & Richard Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, at p. 34

[482] Such as, *The Herald of Free Enterprise*, *The Scandinavian Star*, *The Estonia*, and etc.

[483] See generally, Richard Shaw, *Historical Background of the ISM Code*, XXXIV European Transport Law 11 (1999); Antonio J. Rodriguez & Mary Campbell Hubbard, *The International Safety Management Code: A New Level of Uniformity*, 73 Tul. L. Rev. 1585 (1999). Pierre Bonassies, *Le code ISM et la limitation de responsabilite de l'armateur*, Le Droit Maritime Francais 150 (2002)

[484] As commented by Cresswell J. in *The Eurasian Dream* [2002] 1 Lloyd's Rep 719, "…the ISM Code…is a framework upon which good practices should be hung. Even for companies - or for that matter vessels – who waited until the last minute to apply for certification, the principles are so general and so good that a prudent manager/master could very well organize their companies/vessels' work

The ISM Code can either work in favor or against the shipowner.[485] Both the shipowner and the claimant can effectively make use of compliance or non-compliance with ISM through thoroughly scrutinizing the relevant documents and procedures, in order to establish whether fault or neglect can be denied or proved.

Under the old test, it would be hard for the shipowner to prove the absence of actual fault or privity if the non-compliance that caused the casualty were already known or presumably known to the designated person, as the designated person is responsible for ensuring compliance with the ISM provisions and therefore has direct access to the highest level of management. The actual fault or privity of the designated person will very likely be attributed to the corporation.[486] For instance, considering the judicial tendency towards expansive construction of the privity or knowledge standard under the U.S. law, the implementation of the ISM Code will make it harder for the shipowners to prove his lack of privity or knowledge. On the other hand, the existence of a complete set of ISM documentation and certificates may virtually assist the shipowner to seek limitation because it will enable him to prove the absence of actual fault or privity. In the past the shipowner has often found it hard to meet the burden of proof due to lack of documentation and turning to rely on testimony that was hardly deemed convincing. A properly maintained SMS and compliance with the ISM will make it easier for the shipowner with documentary proof to meet his burden of proof.

Under the new test in the 1976 Convention, it is not clear whether the lack of ISM certification qualifies for the standard for debarring the right to limitation. However, the institution of the designated person and the documentation required by the Code will put the owner's defense of not being personally aware in question.[487] Anyway, since the ISM Code requires management arrangements to be more transparent, and more subject to regular scrutiny than ever, this may expose owners to a greater risk of challenge to their right to limitation of liability.[488]

Effect of ISPS Code on the Limitation of Liability

The International Ship and Port Facility Security (ISOS) Code has been developed in response to the tragic events of 11 September 2001.[489] The ISPS Code has established a regulatory framework designed to detect and eliminate security threats affecting ships and port facilities used in international trade. The Code was adopted as part of

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following those [at present] guidelines – unless hindered to do so by other instructions that have yet been withdrawn".

[485] See Eddy Somers, *Effects of ISM on the Limitation of Liability: the End or a New Beginning?,* XXXIV European Transport Law 37 (1999)

[486] For the discussion of the position and authority of designated person in the corporation, see Craig H. Allen, *The Future of Maritime Law In the Federal Courts: A Faculty Colloquium: Limitation of Liability*, 31 J. Mar. L & Com. 263, 278 (2000).

[487] See generally Marc A. Huybrechts, *The International Safety Management Code from Human Failure to Achievement*, XXXIV European Transport Law 17 (1999).

[488] See generally Richard Shaw, *The ISM Code and Limitation of Liability,* International Journal of Shipping Law (1998)

[489] The U.S. was the first country to take unilateral action designed to protect the maritime industry against terrorist acts and the use of ships as implements of such attacks. The Maritime Transportation Security Act 2002 was formed to enhance maritime security within its territory. See generally, Christopher E. Carey, *Maritime Transportation Security Act of 2002 (Potential Civil Liabilities and Defenses)*, 28 Tul. Mar. L.J. 295 (2004)

an additional chapter (Chapter XI-2 on Special Measures to Enhance Maritime Security) to the International Convention for the Safety of Life at Sea (SOLAS) 1974 and came into force on 1 July 2004. The Code will undoubtedly impact significantly not only on the management and operation of the shipping industry but also on the prevailing legal regime since it imposes a series of obligations on the leading players in the international trade.[490] The market has already developed a number of ISPS-related contractual clauses.

The ISPS Code applies to all cargo ships not less than 500 gross tonnage, passenger ships, mobile offshore drilling units, and port facilities serving such ships engaged on international voyages. The ISPS Code adopts a risk management approach to ship and port security, with overall responsibility vested in Flag States. The difference between the ISPS Code and the ISM Code is that the former Code is designed to apply not only to vessels but also to shore side operations and port facilities.

Under the ISPS Code, each shipowning company operating in a contracting state is under an obligation to make sure that each of its vessels carries on board a ship security plan (SSP) approved by the relevant administration, appoint a ship security officer (SSO) for each of its vessels, and designate a company security officer (CSO) for every vessel it owns. The responsibility of the SSO is to build up a culture of security on board the ship through training and exercises and by the review of the SSP. The CSO is a member of the shore-side management who is to undertake responsibilities with regard to the monitoring of security for the vessel(s) for which he is responsible within the organization.

With regard to port facilities, each contracting state has to complete a port facility security assessment (PFSA) for each port facility within its territory that serves ships on international voyages. On the basis of the PFSA, if it is deemed necessary, the contracting state has the duty to develop and maintain a port facility security plan (PFSP). The contracting state is also responsible for appointing a port facility security officer (PFSO) for each port facility, who is responsible for building a culture of security within the port facility through training and exercises.

To date, the ISPS Code has been implemented with less difficulty than first feared. The formal requirements of the Code have been acted upon throughout the world, since most ships have their SSP approved and most ports have put their PFSP in place.

The ISPS Code will certainly have an effect on the right to limitation since many claims which arise in the course of operation and management can potentially be attributed to a failure on the part of shipowners to comply with obligations imposed by the ISPS Code. Under the ISPS Code, the shipowning company has a duty to appoint an SSO and a CSO for each of its vessels with particular responsibility for ship-board and shore-side implementation of the ship's security plan with direct reporting access to the owning company's board of directors. It is likely that the CSO may be considered as the *alter ego* if he fails either to report deficiencies to the board or to make steps to monitor the ship's security plan or to rectify discoverable

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[490] See Editorial, *The ISPS Code – Implications for the Private Law of International Shipping*, 10 Journal of International Maritime Law 217 (2004); Editorial, *The International Ship and Port Faciltiy Security (ISPS) Code: Public and Civil Law at a Crossroads?*, 12 Journal of International Maritime Law 223 (2006)

deficiencies. To the extent that the CSO is empowered to order specific action to be taken, he may be construed to be the *alter ego* of the company.

Furthermore, the ISPS Code, like the ISM Code, requires the shipowning company to produce and retain substantial volumes of records relating to the establishment and monitoring of the ship's security system. This will also have a material effect on the right to limitation. It is usually difficult for the claimants to obtain the necessary evidence to prove the requisite degree of recklessness. With the ISPS Code in operation, it is possible that the evidential paper records will give the claimants much greater opportunities to challenge the right to limit.[491]

5.2.2 Intent to Cause such Loss

Under the new test, the key to defeat the right to limitation is the state of mind of the person liable at the time of the material conduct. To deprive a shipowner of his right to limit, he must commit an act with the intent to cause the loss or recklessness with knowledge. With respect to the first criteria, it is difficult to imagine how the claimant could prove this because it would almost seem to be necessary to explore the highly complex mind of the party who committed the act. It is suggested that there should be some element of criminal intent involved; otherwise, it is almost impossible that the shipowner's actual intent to cause the loss could be definitely proved.[492] Therefore, to determine whether the shipowners are entitled to limitation of their liability, focus is more often put on the second criteria, i.e., reckless act with knowledge.

5.2.3 Recklessly and with Knowledge

The second criteria is in some sense related to the first one as far as the state of mind is concerned. As a matter of fact, the test for defeating the right to limit was derived from the Convention on Air Carriage. Therefore, it is necessary to refer to some leading cases concerning carrier's limitation of liability in the aviation field from time to time to have a better understanding of the terms.

5.2.3.1 Wilful Misconduct

In the original text of the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, the term "willful misconduct"[493] was used instead of reckless act. Later on in the 1955 Hague Protocol to the Warsaw Convention reckless act with knowledge was inserted as the standard for debarring the right to limitation.[494] Willful had many dictionary meanings, including that

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[491] See generally, Baris Soyer & Richard Williams, *Potential Legal Ramifications of the International Ship and Port Facility Security (ISPS) Code on Maritime Law*, L.M.C.L.Q 515 (2005)

[492] Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, at p.408.

[493] Actually, "willful misconduct" is well known to maritime practitioners since the U.K. Marine Insurance Act 1906 provides that the insurer is not to be liable for any loss attributable to the willful misconduct of the insured. "Gross negligence or willful misconduct" also appears in the U.S. Oil Pollution Act 1990 for debarring limitation of liability of persons liable for oil pollution. These terms, although not exactly the same, are generally considered to convey a similar meaning to the language under the 1976 Limitation Convention. Therefore, judicial interpretations of these terms may help understand the conduct test under the 1976 Convention.

[494] Article 25 of the 1955 Protocol provides: The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or

something be done in a reckless manner, or a designed manner, purposely, intending the result which comes about. Willful also had the connotation of a positive act, as opposed to a negative act leading to negligence which arose merely from heedlessness or nonfeasance. In *Horabin v. BOAC,*[495] willful misconduct is described as misconduct to which the will is a party, and it is something which is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. Willfulness connoted that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding or alternatively that he did it quite recklessly not caring whether he was doing the right or the wrong thing, quite regardless of the effect of what he was doing on the safety of the aircraft and the passengers. To be guilty of willful misconduct the person concerned must appreciate that he is acting wrongfully … and yet persists in so acting … with reckless indifference as to what the results may be.[496]

Indeed, the judiciary has adopted an almost consistent interpretation for the conduct test for debarring the right to limitation despite the terms had changed from willful misconduct to reckless act with knowledge. For example, in *Thomas Cook v. Air Malta*,[497] Mr. Justice Cresswell, in its elaboration of willful misconduct, stated:" …for willful misconduct to be proved there must be either (1) an intention to do something which the actor knows to be wrong or (2) a reckless act in the sense that the actor is aware that loss may result from his act and yet does not care whether loss will result or not…".[498] It appears willful conduct is essentially very close or might be even tantamount to the test as contemplated by Article 4 of the 1976 Convention.

5.2.3.2 Recklessness and Knowledge

Recklessness

The concept of recklessness or knowledge is not easy to define and is notorious for its different meanings in different contexts. Recklessness was regarded as containing two elements: first, acting in such a manner as to create an obvious and serious risk; and second, doing so without giving any thought to the possibility of there being any such risk, or having recognized that there was risk involved, nevertheless deciding to take the risk.[499] In short, recklessness, beyond mere negligence refers to an obvious risk of damage and failure to give any thought to the possibility of it or recognition of the risk and going on to take it. As Eveleigh L.J. put in *The Goldman,*[500] when conduct is

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agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

[495] [1952] 2 Lloyd's Rep. 450.

[496] See also *Rustenberg Platinum Mines Ltd. v. South African Airways*, [1977] 1 Lloyd's Rep. 564. For a discussion on wilful misconduct and recklessness, see generally, Neil R. McGilchrist, *Article 25: an English approach to recklessness,* L.M.C.L.Q. 488 (1983)

[497] [1997] 2 Lloyd's Rep 399, 407

[498] Similar observations were delivered in *Rolls Royce v. HVD* by Mr. Justice Morrison, [2000] 1 Lloyd's Rep 653, as well as in *KLM Royal Dutch Airlines Holland v. Tuller*, 292 F. 2d 775 (D.C.Cir.), cert. denied, 368 U.S. 921 (1961).

[499] See, e.g., *Albert E Reed & Co Ltd v London & Rochester Trading Co Ltd* [1954] 2 Lloyd's Rep 463; *Commissioner of Police of the Metropolis v Caldwell*, [1982] A.C. 341; *Regina v Lawrence*, [1982] A.C. 510.

[500] *Goldman v Thai Airways International Ltd.*, (1983) 3 All ER 693, the issue was whether Article 25 of the Warsaw Convention prevented the defendant airline from limiting its liability for injuries caused

stigmatized as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly, he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. That is the ordinary meaning of the word. The nature of the risk involved should be considered when deciding whether or not an act or omission is done recklessly.

Knowledge

The concept of knowledge is complex and subtle. According to Mr. Justice Dyson in the *Nugent v. Goss Aviation*,[501] there are mainly three types of knowledge within the discussion of loss of right to limit. The first one, called "actual conscious knowledge", is the type of knowledge as described in *The Goldman*[502] as "actual knowledge in the mind of the pilot at the moment at which the omission occurs". The second, called "background knowledge", is knowledge which would be present to the mind of a person if he thought about it.[503] The third, called "imputed knowledge (constructive knowledge)", is knowledge which a person ought to have known but does not in fact have.

The authorities clearly established that "knowledge", in the context of limitation of liability, is actual and not imputed knowledge. For instance, in *The Goldman*, the court observed that it was not sufficient to show that, by reason of his training and experience, the pilot ought to have known that damage would probably result from his act or omission. It is not reasonable to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed. Similarly, in *Rolls Royce v. HVD,*[504] according to the judge, there is a distinction between liability because of ignorance and liability because of knowledge. That is, there is a clear distinction between what a person ought to (should) have known and what a person must have known (did know), only the latter will suffice the criteria for loss of right to limitation. This was also confirmed in *Nugent v. Goss Aviation* that actual knowledge is required, … in the sense of appreciation or awareness at the time of the conduct in question, that it will probably result in the type of damage caused. Therefore, the test of knowledge should be a subjective one, which satisfies the needs and purpose of the Conventions to preserve the right to limitation for the person liable.

However, in *Nugent v. Goss Aviation*, some argument was put forward as to whether "knowledge" is restricted to actual knowledge, or whether it also includes background

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because the pilot disregarded standing orders that seatbelts should be fastened when there was a risk of turbulence.

[501] [2000] 2 Lloyd's Rep 222. In this case, a passenger and a pilot were killed in a helicopter crash. The claimants sought to rely on Articles 25 and 25A of the Warsaw Convention, to defeat the defendants' limitation of liability, with the allegation that carrier/pilot acted recklessly and with knowledge that damage would probably result.

[502] *Supra* note 79.

[503]. For instance, the claimants argued that the probability of damage was within the pilot's knowledge in that … if he had addressed his mind to the matter, he would have appreciated by reason of his knowledge and skill as an experienced pilot that death or serious injury was probable…

[504] [2000] 1 Lloyd's Rep 653, aircraft was chartered to carry engines but engines were damaged while being unloaded, it was held that neither the company nor any of its employees were guilty of wilful misconduct or recklessness with knowledge, because there was a proper safety culture within the company at the most senior level, notwithstanding the company's failure to have a proper system of work which would have ensured that only properly trained and qualified people operated such vehicles was causative of the accident.

knowledge.[505] The majority in the Court of Appeal rejected the assumption that the test for debarring the right to limit liability was drafted to include background knowledge and made it clear that there is nothing in the language of Article 25 or the *travaux preparatoires* of the Convention indicating that it was intended to include some categories of knowledge not present to the mind at the time of the act or omission. Those who drafted Article 25 should not intend that anything less than actual conscious knowledge would suffice. It is a mental state that is clear and simple to understand. Extension of the scope of knowledge for limitation purposes will cause uncertainty and difficulties of classification.[506]

For the purposes of limitation of liability, the two requirements of recklessness and knowledge are separate but cumulative. For instance, in *S.S. Pharmaceutical Co. Ltd. v. Qantas Airways Ltd.,*[507] it was held that the Article 25 test had been satisfied, because the defendants' conduct was reckless as acknowledged to be "deplorably bad handling", and the defendant knew of the likelihood of damage to specially vulnerable cargo in the weather conditions. The damage was the result of reckless acts or omissions with knowledge that damage would probably result rather than either recklessness without such knowledge or mere gross negligence. Therefore, the word "recklessly" has to be construed in conjunction with the words "with knowledge that damage would probably result". In the absence of any allegations of intent, the person challenging the right to limit has to establish both reckless conduct and actual subjective knowledge that the relevant loss would probably result. This is no doubt a stringent requirement, and has been described as "a standard of highly reprehensible conduct".[508]

Probably

The probable consequence of the loss or damage is also not easy to define. It was sufficient for recklessness that a person should act regardless of the possible consequences of his act. However, what the test required was that there should be knowledge of the probable consequences. Thus something more than a possibility is required. The word "probable" has been interpreted in *The Goldman* as to mean "something is likely to happen". Alternatively, it has also been interpreted as implying that "one anticipates damages from the act or omission".[509] In *The Leerort,*[510] the

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[505] *Supra* note 80. According to Pill, L.J. in the Court of Appeal, while constructive knowledge might be excluded, some background knowledge, even if not in the forefront of the relevant person's mind, could be relied upon to defeat the right to limitation.

[506] Right as Auld L.J. put it, "...I do not accept the distinction that he seeks to draw between imputed knowledge and background knowledge, the latter, but not the former, counting as actual knowledge for the purpose. Putting the two notions into separate compartments is difficult both logically and in a factual application to the exercise of determining a man's state of mind."

[507] (1991) 1 Lloyd's Rep. 288, where damage was incurred to air cargo as a result of the defendant having left it out in the open in the course of transit. See also, e.g., *Gurtner v. Beaton,* (1993) 2 Lloyd's Rep. 369, where an aircraft crashed into a hillside by a pilot who mistakenly thought that he was flying over low ground; *The Goldman* (1983) 3 All ER 693.

[508] As the Canadian Federal Court stated in *Swiss Bank Corporation v. Air Canada,* (1981) 129 D.L.R. (3d) 85, in the case of a pilot of a light aircraft, ... it must be a very extreme case in which it could be held that the pilot acted recklessly and with the requisite knowledge. If so he would be deliberately hazarding not only the aircraft, but his own life with the knowledge that damage would probably result.

[509] See *The Goldman,* (1983) 3 All ER 693, 700.

[510] See *The Leerort* [2001] 2 Lloyd's Rep. 291, 295. In this case, *Leerort*, laden with cargo, was lying peacefully in a berth at the Jaya Container Terminal in Colombo, when the vessel *Zim Piraeus*, while in

court expressed the similar opinion, i.e., when damage results from a collision the shipowner will only lose his right to limit if it can be proved that he deliberately or recklessly acted in a way which he knew was likely to result in the loss of or damage to the property of another in circumstances where, inevitably, the same consequences would be likely to flow to his own vessel.

The obviousness of the risk, to some extent, determines whether there is the knowledge of the probability of damage so as to infer that the person liable recognized the risk and went on to take it. Thus, the greater the obviousness of the risk, the more likely it is to infer recklessness and that the person liable, in so doing, knew that he would probably cause damage.[511]

The test under the 1976 Convention for defeating the right to limit, on one hand, succeeds the construction of the test in the Warsaw Convention; on the other hand, since there is still some slight difference between the wording of the two tests, actually the test in the 1976 Convention provides even greater protection for the person liable than the one in the Warsaw Convention.

Under the Warsaw Convention, the test to debar the right to limit applies to the act or omission of "the carrier, his servants or agents". Thus, the right to limitation is defeated where it is proved that the damage resulted not only from such an act or omission on the part of the carrier himself but also his servants or agents. While under the 1976 Convention, the loss must result from the "personal" act or omission of the person liable. Thus, to defeat the right to limit, it is necessary to identify the causative act or omission on the part of such a person that caused the loss.

Furthermore, under the Warsaw Convention, the relevant requirement to defeat the right to limitation is with intent to cause "damage, or recklessly and with knowledge that damage would probably result". While under the 1976 Convention, it is only conduct committed with intent to cause "such loss", or recklessly with knowledge that "such loss" would probably result, that defeats the right to limit. The words "such loss", seem to require foresight of the very loss that actually occurs, not merely of the type of loss that occurs, and the loss is the subject matter of the claim in which the right to limit is asserted.[512]

Summary under the 1976 Convention

To sum up, the situation under the 1976 Convention is quite different from that in the 1957 Convention under which it was easy to attribute the employee's actions to the owners so as to disqualify them from the right to limitation. For instance, in *The*

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the course of entering harbour, collided with the port side of *Leerort*. *Leerort* subsequently flooded and settled on the bottom and the cargo was lost or damaged. The owners of *Zim Piraeus* admitted liability for the collision and applied for an order limiting their liability.

[511] See *Nugent v. Goss Aviation*, [2000] 2 Lloyd's Rep 222.

[512] See *The Leerort* [2001] 2 Lloyd's Rep. 291, 294-95. The Court of Appeal observed that it is totally absurd to suggest that a 50 second interruption in the operation of the engine, as a consequence of which the collision took place, might be attributable to an act or omission of the owners done with the intention of bringing their ship into a collision, or performed recklessly with knowledge that it was likely to produce this result.

Tasman Pioneer,[513] it was held that the casualty did not arise from the charterer's personal act or omission; nor did it occur when the charterer intended to cause the loss; nor had the charterer acted recklessly in the knowledge that the loss or damage would probably result. The grounding of the vessel was caused by the master's negligent navigation not attributable to the charterer.

Similarly, in *The MSC Rosa M,*[514] it was held that, to challenge the shipowner's right to limitation in the limitation action, the cargo claimants had to prove: (a) the capsize was caused by the personal act or omission of the demise charterers; (b) the personal acts or omissions were committed recklessly; (c) at the time of those acts or omissions, the *alter ego* of the demise charterers actually knew that a capsize would probably result. Once again, it was emphasized that, constructive knowledge was not sufficient to defeat the right to limitation; instead the essence would be that the relevant person suspected or realized something, but did not make further enquiries. Shut-eye knowledge can hardly constitute actual knowledge for the purpose of Article 4. Indeed, the claimants demonstrated no reasonable ground for challenging the right to limit. Their pleading reflected an unsuccessful attempt to disguise a plea of actual fault or privity for the purposes of the 1957 Limitation Convention as a plea of reckless act with knowledge of the probable consequences in the context of the 1976 Convention.

As a matter of fact, under the new test, only truly exceptional cases would give rise to any real prospect of defeating the owners' right to limit.[515] That was what happened in *Margolle v. Delta Maritime Co Ltd (The Saint Jacques II & Gudermes)*,[516] the rare chance of the right to limit was successfully challenged based on Article 4 of the 1976 Limitation Convention. In this case, as there were no suggestions that the collision was caused intentionally, the focus rested on the criteria of "recklessly with knowledge". It was found that there had been a repeated practice, in flagrant breach of the Collision Regulations, directed personally by the owner for commercial reasons, i.e., to reach the fishing grounds in advance of the other fishing vessels which had left Boulogne at the same time. This was conceded as "reckless". With regard to the other requirement of "knowledge", on the facts of the appalling navigational practice conducted under the personal instruction of the owner, coupled with the obviousness of the risk of collision, it could possibly be inferred that the owner had the relevant actual knowledge that a collision would probably result.[517] There was a real prospect

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[513] [2003] 2 Lloyd's Rep. 713. In this case, the vessel *Tasman Pioneer* grounded in the Inland Sea of Japan. Salvors pulled her free and beached her. The cargo was unloaded but much was damaged and as a result claims had been commenced.

[514] [2000] 2 Lloyd's Rep. 399, where the claims arose out of an incident occurred on Nov. 39, 1997 when the vessel *MSC Rosa M*, a container ship demise chartered to MSC, nearly capsized, and resulted in substantial salvage claim and cargo claims.

[515] See, e.g., *The Bowbelle* [1990] 1 Lloyd's Rep 532, *The MSC Rosa M* [2000] 2 Lloyd's Rep 399 and *The Leerort* [2001] 2 Lloyd's Rep 291.

[516] [2003] 1 Lloyd's Rep 203. In this case, the vessel *Gudermes* owned by DM, while proceeding southwards in the Dover Straits Separation Scheme, collided with the vessel *Saint Jacques II*, which was navigating across the traffic separation scheme on a heading against the flow of traffic for the purpose of arriving at the fishing grounds before other vessels, as was obviously contravening the 1972 Collision Regulations. DM claimed damages for both the vessel and the cargo on board.

[517] It was stated that "…it is perfectly arguable that the conduct of the owners of the fishing vessels took place over a period of time when it is certainly possible, that they formed, they became aware and appreciated that they were going to collide with the very vessel that they collided with, and that they were reckless in carrying on without taking any, arguably any, avoiding action." It was further observed that "…where somebody inserts himself or his vessel into the path not only of one vessel but

demonstrated by the claimant that what was involved on the facts was the taking of a "stupid risk" or a "reckless maneuver...by a non-suicidal"[518] mariner sufficient to bring the matter within Article 4 of the 1976 Convention. Here, neither the risk or probability of a collision declines with repeated reckless navigation, nor the frequency with which the reckless practice was conducted points to something short of a probability of collision.[519]

Nevertheless, different jurisdictions may produce different results even based on the same test for defeating the right to limitation. For instance, French case law has indicated that the test to defeat the right to limit under the 1976 Convention has been interpreted in a restrictive way and it is thereby easier for the claimants to challenge the right to limitation successfully.[520] This is very opposed to the position that common law scholars would have expected in relation to conduct barring limitation.

For example, in *The Heidberg,*[521] it was found that the principal cause of the collision arose from the inadequacy of the number of officers necessary for managing the ship. The court held that the owners knew that they were taking a risk by employing insufficient crew and that the probable outcome was an accident of the sort which occurred. Therefore, the shipowner could not rely on the right to limit liability pursuant to the law that codified the 1976 Limitation Convention. Having examined the 1976 Convention, the court concluded that it did not create an unconditional right to limit liability but merely granted a privilege of which the owner could take advantage only if he took proper steps to comply with the law and common maritime usage in order to ensure that the vessel was properly and safely operated.

The court further stated that public opinion increasingly required the senior executives of companies whose employees caused accidents to be held responsible for their actions, particularly in the field of employment and transportation. Interestingly, it appears that the court brought forward the criteria of "public opinion" to qualify the right to limitation. As introduced in the beginning of the thesis, limitation is not a matter of justice but a rule of public policy; public policy itself is a very flexible concept. With the newly introduced criteria of public opinion, courts will possibly be allowed more scope to deprive the right to limit if they believe it necessary by construing the test in a restrictive manner. It is to be hoped that this will not happen since the international community has achieved certainty on the issue of the limitation of liability and acknowledged the viability of the regime based on public policy through enormous argument of the pros and cons. Indeed, any attempts by courts to redefine the line of public policy or establish a questionable new criteria will only

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of three vessels and carries on regardless, ...there were two vessels overtaking, or overhauling ...*The Gudermes*, that that is the type of conduct which the drafters of the convention had in mind. It is not the possibility of some damage happening somewhere at some time to somebody but it is very close to being specifically polarized towards the very damage which did occur."

[518] See *Nugent v. Michael Goss Aviation Ltd* [2000] 2 Lloyd's Rep. 222, *per* Auld L.J.

[519] For more comment on this case, see DRT, *Breaking the Right to Limit Liability*, 9 Journal of International Maritime Law 93 (2003)

[520] For the perspective of the French scholars on conduct barring limitation, see Antoine Vialard, *L'Evolution de la Notion de Faute Inexcusable et la Limitation*, Le Droit Maritime Francais 579 (2002). Also see generally, Pierre Bonassies, *Synthese: La limitation de responsabilite du proprietaire de navire*, Le Droit Maritime Francais 1083 (2002).

[521] The *Heidberg* [1993] 2 Lloyd's Rep. 324, by the Commercial Court of Bordeaux. In this case, the vessel, when approaching Pauillac, collided with a Shell jetty as a result of the master having left the bridge for six minutes to go down to the engine room to shut the ballast sluices.

weaken that certainty to the disadvantage of all those engaged in shipping industry and their insurers.[522]

Likewise, in *The Johanna Hendrika*,[523] with the similar logic as embodied in *The Heidberg*, the court held that the owners could not limit their liability, because they had not taken elementary safety precautions either to carry out the relevant maneuver or to ensure the safe keeping of the dredger.

Some argued that the French courts interpret Article 4 of the 1976 Convention in such a way as to permit the limit to be broken in cases of "gross negligence" rather than only in cases of intent or recklessness with knowledge that such loss would probably result. It was further alleged that there was wide perception amongst practitioners in France that French courts will attempt, if possible, to make a finding of intentional or reckless behavior by "fishing the facts." Whether this allegation stands up or not, the French judiciary seems to be inclined to deprive shipowners of their right to limit liability more or less by adopting the objective test which was persistently applied by the French courts in the aviation cases to examine the conduct of the shipowners. It is hard to say that the French courts do not adhere to the provision of the 1976 Convention. Or, perhaps it is more likely that the French judiciary does not give sufficient weight to the subjective requirement that the shipowner should personally have knowledge that the loss would be likely to result, and intends to put forward a different approach to the true construction of the Convention.[524] Leaving aside the debate on the right approach to the construction of the provision of the Convention, it seems generally accepted that the main purpose of drafting the 1976 Limitation Convention is to establish an almost unbreakable limitation privilege as a trade-off for the higher limits. Bearing this in mind, there should not be much deviation from the legislative intent when putting construction on the test for defeating the right to limitation.

5.2.4 Onus of Proof

In contrast to the burden of proof under the old test where the shipowner had to prove that the damage occurred without his actual fault or privity, under the 1976 Convention, the onus of proof shall be placed upon the person challenging the right to limit (claimant) to prove either that the person liable intended to cause the loss or that he acted recklessly and with knowledge that damage would probably result.[525] This is a complete reversal of the previous burden of proof. As Mr. Justice Clarke said in *The Capitan San Luis,*[526] the shipowner merely has to establish that the claim falls within Article 2 of the Convention. Once he establishes that, he is entitled to a decree limiting his liability, unless the claimant proves the facts required by Article 4. Thus, the claimant has to take great efforts to gather evidence of the shipowner's bad conduct which is usually inaccessible and hard to obtain especially when the shipowner is a company. Furthermore, he has to explore the shipowner's state of mind

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[522] Richard Williams, *What limitation is there on the right to limit liability under the 1976 Limitation Convention*, International Journal of Shipping Law 117, 125 (1997).

[523] *The Johanna Hendrika,* by the Court of Appeal of Rouen, 1994. In this case, a dredger grounded when the tide ebbed and it then slid towards the quay crushing two fishing boats at Le Treport.

[524] See *The Happy Fellow*, [1997] 1 Lloyd's Rep. 130, 137.

[525] This is shown by the wording of Article 4 of the 1976 Convention "if it is proved that the loss resulted from his personal act or omission…".

[526] [1993] 2 Lloyd's Rep. 573

which is also a nearly impossible task. This onerous burden of proof imposed by Article 4 has virtually further increased the difficulty to break the right to limitation in favor of shipowners.

5.2.5 Under the Chinese Law

In China, prior to the enactment of the Maritime Code, there was no statutory provision governing conduct barring limitation. Therefore, maritime jurisprudence was rather ambiguous due to a lack of statutory guidance. Pursuant to the general principles of civil law, international practice shall be followed when there are no relevant provisions either in the domestic law or in the international treaty concluded or acceded to by China. There were some indications in the court decisions that the conduct test of actual fault or privity under the 1957 Convention which was in relatively common use at the time in many jurisdictions, was often referred to in determining whether the right to limitation should be granted.

The situation has changed since the Maritime Code was enacted. With respect to shipowner's limitation of liability, the Code adopts exactly the same wording for debarring limitation as that in Article 4 of the 1976 Limitation Convention. Article 209 of the Code provides that a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

However, in judicial practice, it seems that China maritime courts have adopted a quite different approach to the construction of the test for defeating the right to limitation. The logic of Chinese maritime courts in determining whether there is intentional or reckless act is essentially to see whether the loss or damage is caused by unseaworthiness.[527] The doctrine of seaworthiness serves as an effective means to defeat shipowner's right to limitation. Failure to exercise due diligence to make the vessel seaworthy and properly manned is very often taken as the reckless act done with knowledge in the practice of Chinese maritime courts. As a result, the shipowner is neither excluded from nor entitled to limit his liability.

For instance, in *The Guangda,*[528] the court held that the damage to cargo was mainly caused by unseaworthiness of the vessel *Guangda,* to be specific, uncargoworthiness of the cargo hold. The fact of unseaworthiness was presumed to satisfy the test for debarring limitation in that the shipowner put the vessel into operation recklessly with knowledge that such loss would probably result. Therefore, the shipowner was not entitled to limit his liability. Similarly, in *The Sanshan*,[529] the shipowner was denied

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[527] As to the criteria of seaworthiness, according to the Maritime Code which borrowed the majority of provisions from the Hague-visby Rules (some provisions from the Hamburg Rules) in the Chapter of Carriage of Goods by Sea, it contains three elements, i.e., seaworthiness of vessel, properly equipping, manning and supplying the vessel, and cargoworthiness of vessel.

[528] [1997] Shanghai Maritime Court. In this case, the cargo carried on the vessel *Guangda* from Thailand to Dalian was found partly damaged by water during discharge in Dalian. As a result, the cargo owner commenced proceedings against the shipowner for the cargo damages, and the latter applied for limitation of his liability.

[529] [1996] Shanghai Maritime Court. During the voyage from Pusan, Korea to Shantou, China, despite great efforts taken for towage and salvage, the vessel *Sanshan* sank together with the cargo on board in total loss. The time charterer applied for limitation of liability for the cargo claims.

the protection of limitation of liability because of improper stowage and lashing of cargo on deck which, according to the court, the shipowner ought to have known.

In *The Kaitone No.6,*[530] although the shipowner was granted the right to limit his liability, the line of reasoning followed by the court nonetheless suggested that the doctrine of seaworthiness applicable to the carriage of goods by sea should likewise be applied to determine whether the person liable could enjoy the privilege of limitation. The key issue was focused on whether the relevant crew not holding a certificate of competency constituted unseaworthiness. Since the applicable law concerning crew manning, i.e., the law of the place of vessel registration (Hong Kong), did not require crew on board a non-motor barge to hold the certificate of competency, the claimants' allegation of unseaworthiness was dismissed. Consequently, the judge concluded that there was no reckless act on the part of the shipowner so as to defeat his right to limitation.

In *The Chunmu No.1,*[531] the court held that the shipowner had breached his obligation of exercising due diligence to make the ship seaworthy, in that he failed to supply relevant local navigational materials such as navigation notice, guide for entering and departing from the port, waterway manual and other administrative port regulations for the vessel, and failed to ensure the crew to get appropriate training and obtain the corresponding certificates. The unseaworthiness had directly caused the collision and consequently incurred serious pollution damage, which was deemed by the court as the reckless omission of the shipowner done with knowledge that such loss would probably result. Therefore, the shipowner was denied the right to limit his liability. It is also notable that in this case, the court adopted the objective test—the shipowner ought to have known that the unseaworthiness of *Chunmu No.1* would probably result in the collision, to determine the limitation issue.

As a matter of fact, the reluctance of the maritime court to grant the shipowners the right to limitation in this case is presumed partly to reflect the practical considerations of the court in respect of pollution damage from carriage of hazardous chemicals by sea. Till now China has neither ratified the 1996 HNS Convention, nor enacted any domestic legislation on the liability and compensation for damage by carriage of hazardous and noxious substances except some legislation regulating the administrative aspects thereof.[532] Thus, for the time being the Maritime Code is the

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[530] Guangzhou Mar. Court (Shi Zi) Civil Ruling No.74 (1997). In this case, when the cargo containers were being loaded into the *Kaitone No. 6* (a barge registered in Hong Kong) at Huangpu port, 36 containers dropped into water due to the bad operation of the deck hand which subsequently caused the tug *Xinhai No.9* laying besides *Kaitone No.6* to sink. The shipowner of *Kaitone No. 6* applied for limitation of his liability for the claims arising from property damage and constituted a limitation fund as well.

[531] [2001] Guangzhou Maritime Court. The vessel *Chunmu No.1* which carried a cargo of styrene from Deasan in Korea to Zhanjiang in China, collided with the vessel *Changtong No.1* when entering into the Zhanjiang port without pilot on board. As a result of the collision, a large quantity of styrene leaked into the sea and caused serious pollution damage to the coastal environment and the fishery industry in the area of Zhanjiang. Zhanjiang Fishery Association of Guangdong Province claimed pollution damages on behalf of all parties that were affected by the pollution. The shipowners of *Chunmu No.1* applied for limitation of their liability, which was subsequently challenged by the Fishery Association.

[532] There are some administrative provisions on environmental protection and control of dangerous goods, such as the Marine Environmental Protection Law, the Environmental Protection Law, the Regulations on Administration for Preventing Marine Environment by Vessels, and the Regulations on Control of Dangerous Goods Carried by Vessels.

applicable law governing damages arising from carriage of such substances. In accordance with the provisions of Article 207 of the Maritime Code, a claim for damage from hazardous chemicals is subject to limitation since it does not fall within claims excluded from limitation as enumerated in the provisions of Article 208 of the Maritime Code. However, if the shipowners were allowed to limit their liability, it would cause severe injustice to the victims who suffered from loss or damage arising out of coastal environmental pollution, because they would eventually get insufficient compensation from the limitation fund. Perhaps, based on practical concerns, this will hopefully speed up China's legislation on liability and compensation caused by the carriage of HNS substances. Hence, the global limitation of liability, together with the special limitation regime for oil pollution claims and HNS claims etc. will be coordinated and harmonized so as to constitute a comprehensive limitation of liability regime in the future.

It appears that the maritime courts in China take the tendency to denying limitation of liability on the ground that the shipowner has failed to exercise due diligence to make the vessel seaworthy, despite the clear wording of the test provided in the Code, i.e., intentional or reckless act with knowledge. As a result, the right to limitation is easy to be defeated. This seems to be a substantial departure from the object and purpose of Article 4 of the 1976 Convention to make the limitation privilege nearly unbreakable. As indicated in the Introduction of the thesis, modern justification for limitation regime is based on insurance at reasonable cost; therefore it is important that limitation should be unbreakable unless the shipowner is personally blameworthy to such an extent that he should be deprived of his insurance cover. Actually, the relevant provisions governing carriage of goods by sea are to exonerate the shipowner from liability for certain types of damage due to causes beyond his control, provided that the shipowner exercises due diligence to make the vessel seaworthy. Therefore, breach of the duty to make the vessel seaworthy means that the shipowners cannot be exempted from their liabilities. However, it does not follow that the right of limitation is lost as well.

Even under the old test, it was unnecessary and incorrect to introduce the duty of seaworthiness into the process of determining the right to limitation. It was indicated that breach of this duty goes only to liability and leaves untouched the question whether there is such actual fault or privity on the part of the shipowners themselves as will defeat their right to limitation. It follows that the question of actual fault or privity cannot be determined on the basis of the duty to make the vessel seaworthy.[533]

Therefore, the judicial practice of the Chinese maritime courts in determining the issue of limitation of liability is quite questionable. It is to be hoped that the courts will abandon the logic to equal unseaworthiness with loss of the right to limit, and adopt the subjective test for intentional or reckless act with knowledge in a real sense to determine the shipowner's right to limitation.

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[533] See, e.g., *The Truculent,* (1951) 2 Lloyd's Rep. 308; *The Lady Gwendolen,* (1965) 1 Lloyd's Rep. 335. The doctrine of unseaworthiness has been applied to deprive the shipowner's right to limitation in some American cases, e.g., *The Perama*, 388 F.2d 434 (2d Cir.), cert. denied, 393 U.S. 828 (1968); *Trexler v. Tug Raven,* 290 F.Supp. 429 (E.D.Va. 1968), cert. denied, 398 U.S. 938 (1970); *Complaint of Seiriki Kisen Kaisha,* 629 F.Supp. 1374, 1986 AMC 913 (S.D.N.Y. 1986), and perhaps persists to exist due to general judicial hostility towards the limitation regime in the U.S. However, the validity of its application in determining limitation issues is also highly questioned even within the U.S. legal circles.

It may be argued that the 1976 Convention does not provide sufficient protection to shipowners as it intended. The court knows what was in a person's mind through admission by the person concerned or by drawing inferences. Interpretation of the subjective test in the 1976 Convention might be manipulated by the court's perception of the size of the limitation fund, such as what happened in *The Chunmu No.1*. As a result, the judge might be prone to impose his own standard of fairness and equity.[534] Sometimes even when faced with the same kind of factual situations, different courts or even different judges within the same court could reach different conclusions. Besides legal principles or concepts, practical considerations of what the court is prepared to infer as to the shipowner's state of mind is an important factor to take into account in determining the limitation issue.

Conclusion

There are two tests on conduct debarring limitation under discussion in this thesis. Both tests have been adopted respectively in the limitation regimes of various countries. The old one was typically found in the 1957 Limitation Convention, that is, "actual fault or privity" of the owner. There have been numerous cases dealing with this test. To determine what constitutes "actual fault or privity" is very fact-specific and thereby easy to cause confusion, although the courts have established and developed some rough guidelines with regard to individual and corporate shipowners, such as the concept of "*alter ego*". The interpretations of the terms reflect changing judicial attitudes to the limitation system. The case law has revealed that the emphasis is that a shipowner has to ensure efficient management and control of his ships if he intends to enjoy the statutory right to limitation. The test is an objective one. It is also well established that under the old test the burden of proof is on the shipowner to prove his lack of actual fault or privity.

Due to general judicial prejudice against the limitation regime at the time, a new test was introduced in the 1976 Limitation Convention, that is, the shipowner must be guilty of intentional or reckless act with knowledge. It is generally accepted that the almost unbreakable right to limit was introduced in exchange for higher limits. Under the new test, entitlement to limitation of liability could only be challenged in very exceptional circumstances. The burden of proof is upon the claimants to prove the existence of requisite intent or degree of recklessness with knowledge, which is a reversal of the former situation under the old test. In the absence of any allegations of intent, the claimants have to establish both reckless conduct and actual subjective knowledge that the relevant loss would probably result.

The U.K. limitation law adopted the old test prior to adopting the 1976 Limitation Convention and currently applies the new test as introduced by the 1976 Convention. There are plenty of cases dealing with the specific constructions of both tests in the U.K. case law.

In China, the Maritime Code adopts exactly the same wording of the test for debarring limitation as that in Article 4 of the 1976 Limitation Convention, i.e. intentional or

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[534] Donald C. Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 Tul. L. Rev. 1139, 1147.

reckless act with knowledge. However, in judicial practice, it seems that the maritime courts in China have applied the doctrine of seaworthiness to the construction of the test. As a result, the right to limitation is easy to be defeated. This seems to be a substantial departure from the object and purpose of the 1976 Convention to make the limitation privilege nearly unbreakable. It is submitted that the court decisions are based on a fundamental misunderstanding of the principles underlying the limitation of liability. The confusion is presumed to arise from judicial improper attempts to correlate limitation of liability with the law governing carriage of goods by sea. Actually, it is quite clear that an owner's right to limitation is not affected by the operation of the law on carriage of goods by sea. It is to be hoped that the courts will adopt the subjective test for intentional or reckless act with knowledge in a real sense to determine the limitation issue.

While in the U.S., in respect of the criteria to defeat the right of limitation, the Limitation Act has adopted similar wordings as that of the 1957 Convention, namely, "privity or knowledge" of shipowners, which is generally deemed as carrying much the same meaning. The U.S has long been well known for its hostility to the limitation regime and hence inclined to deny the right to limitation by using increasingly exacting standards of privity and knowledge. Thus, it could be easier to break limitation in the U.S. even than under the 1957 Convention. As a result, the privity and knowledge provision of the Act has been the favorite target of claimants who seek to circumvent the limitation provisions. There have been considerable cases indicating erosion of the privity and knowledge defense. The proneness of the courts to expand the scope of privity or knowledge so as to deny shipowners limitation will inevitably result in uncertainty of the law.

Chapter Six Limits of Liability

Introduction

The limits of liability are very crucial to both claimants and shipowners. For the claimants, they can always expect to recover more to satisfy their claims if higher limits are provided; whereas for the shipowners, it's the other way around. Basically, there have been two systems for calculating the limitation fund, i.e., value-based system and tonnage system.

Historically, to encourage shipowners to engage in the risky maritime ventures, the practical solution was to reduce their liability to the value of the venture assets. This value-based system, with variations under different jurisdictions, generally provided that a shipowner's liability would be limited to the value of his ship and the pending freight from the particular voyage. Under the early European continental system, primarily the French abandonment system and German maritime lien system, the limitation fund was calculated on the basis of the post-casualty value of vessel (plus appurtenances, freight earned on the voyage, and other interests in the vessel such as claims against third parties etc.).[535]

The tonnage system, where the limitation fund is calculated by reference to the vessel's tonnage, was originally developed in the U.K. Initially, in an attempt to promote development of shipping by giving shipowners the same advantages as their continental counterparts, the English Parliament enacted the Responsibility of Shipowners Act of 1733 allowing a shipowner to limit his liability for certain types of claim to the value of the ship plus her freight. However, the English version of limitation, unlike its European continental predecessors, used the pre-casualty value of vessel as the basis for calculating the limitation fund. Later on, by the Merchant Shipping Act 1854, the limitation of liability continued to be the value of the ship and freight. However, the limitation fund of minimum £15 per ton of the vessel's tonnage was introduced for personal injury claims.[536] Subsequently, the Merchant Shipping (Amendment) Act 1862 extended the tonnage-based method to other types of claims, establishing an amount of £8 per ton for damage claims.[537] The Act maintained the limit of £15 per ton for personal injury claims but removed the value of the vessel as the upper limit, which represented the departure of English law from the value of the

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[535] See Alex. Rein, *International Variations on Concepts of Limitation of Liability*, 53 Tul.L.Rev. 1259, 1263 (1979). These two systems had the same philosophy and legal justification, but the procedures for surrendering the assets were different. The German system was based upon the premise that the shipowner had no personal liability for damage caused by the acts of the master or crew, therefore the owner had no obligation to the claimants once he had surrendered the vessel and its freight. Under the French system, the owner was liable *in personam*, but was discharged upon surrendering the vessel and freights to a trustee. See generally Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 999 (1979)

[536] The amount of £15 per ton was considered to represent the estimated average value per ton of a well-run British passenger ship in 1854.

[537] The figure of £8 was meant to represent the estimated average value per ton of all British ships in 1862, which was probably a concession to owners of lower-valued sailing ships.

ship as the basis of limitation of liability. Ever since then, all the subsequent limitation legislations have been based upon the tonnage system. Thus, the limitation fund is secured regardless of the remaining value of the vessel after casualty. This tonnage system has later been adopted by the international conventions in respect of limitation of liability, such as the 1957 and 1976/1996 Limitation Conventions. And the U.K. legislations have always kept pace with the development of those Conventions.

While in China, the limitation fund was originally calculated based on the post-casualty value of the vessel plus pending freight according to the "Certain Regulations on Compensation for Maritime Accidents Regulations" of 1959. The Regulations had been generally applied by the courts as the primary source to determine the limitation of liability of shipowners until the Maritime Code which applies the tonnage system was enacted in 1992. The provisions on limitation of liability contained in the Maritime Code were drafted largely by reference to the 1976 Limitation Convention; and the provisions concerning the limits of liability are the same as those in the 1976 Convention with small modifications. These provisions have completely modified the previous value-based system for calculating the limitation fund in China.

The privilege of limitation first appeared in the United States in the state laws of Massachusetts in 1819 and Maine in 1821. Both state laws were modeled on the 1733 English limitation statute and therefore the pre-casualty value of the ship was taken for purposes of calculating the limitation fund. However, those state laws were amended in 1835 and 1840 respectively, presumably to obtain for the shipowners the benefit of post-casualty determination of the limitation fund as contained in the continental system. Later, to protect the American shipowners and grant equality with other maritime countries, the U.S. Limitation of Liability Act was enacted in 1851. By virtue of this Act, the limitation of liability was calculated based upon post-casualty ship's value as in the continental countries rather than the pre-casualty valuation principle which had been adopted in England. The Limitation Act has been amended several times since 1851, among which the most significant one is the 1936 amendment to the Limitation Act. This amendment provided a supplemental fund based on tonnage in respect of personal injury and death claims.

On the international scene, both the 1957 and the 1976/1996 Limitation Conventions adopted the tonnage regime in relation to limitation of liability.[538] However, there is a subtle change in the philosophy of limitation of liability for marine claims. The 1957 Convention was based on the concept that the limit should approximate the shipowners' interest in the maritime venture, i.e., the value of the ship and freight. Whereas in the 1976 Convention, the primary consideration was commercial insurability. That is, the 1976 Convention no longer has anything to do with the supposed value of the ship, but rather with what insurance coverage is available at reasonable cost.[539] Today the objective underlying limitation is more inclined towards fairness to claimants and establishing adequate and reasonably priced insurance for the shipowner.

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[538] The 1924 Limitation Convention is not within the discussion of this paper, since this Convention based on compromise proved to be a failure.

[539] Patrick Griggs, *Limitation of Liability – the 1976 Convention and the 1996 Protocol*, Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton

To date, most maritime countries around the world have adopted the tonnage system of either the 1957 Convention or 1976/1996 Limitation Convention. Obviously, the tonnage system is more advantageous to the claimants since it can often provide higher limitation than the limitation based upon the value of the ship at the conclusion of the voyage. Especially in the event that some disaster occurs, the limitation fund under the value-based system could be quite meager or even as little as zero.[540] However, a post-casualty value-based system is still applied in some countries, particularly in the U.S., although there is general hostility towards its peculiar limitation system. The U.S. judiciary has developed various means to circumvent the shipowner's right to limitation, for example, extending the scope of application of shipowners' privity or knowledge to deny their right to limitation.

Given that various limitation regimes exist around the world, this chapter will discuss issues in respect of limits of liability arising from different regimes in the context of international conventions and domestic legislations including the U.K. law, Chinese law and the U.S. law.

6.1 Under the Conventions

6.1.1 General Limits

6.1.1.1 Under the 1957 Convention

The 1957 Convention was greatly influenced by the previous English limitation legislations; and in respect of limits of liability, the Convention adopted the tonnage system as well. According to Article 3(1) of the 1957 Convention, where only property claims are involved, the limitation fund is set at 1,000 gold francs per ton; where only personal death/injury claims are involved, the fund is set at 3,100 gold francs per ton. Furthermore, it is specifically provided that where the occurrence gives rise to both personal and property claims the fund is limited to the aggregate figure of 3,100 gold francs per ton of which 2,100 gold francs is reserved exclusively for personal claims. When the fund reserved exclusively for personal claims is insufficient to satisfy all the claims, the unpaid balance of such claims ranks ratably with the property claims against the property fund.[541][542] Thus, personal injury and death claims are granted preferential treatment under the 1957 Convention to ensure adequate satisfaction of such claims.

In addition, to mitigate the inherent unfairness of the limitation privilege in the case of small ships which may cause serious loss or damage, ships of less than 300 tons are to

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[540] See *The Titanic,* 209 F. 501 (S.D.N.Y. 1913). However, this will not necessarily be the case with modern high-tech specialist vessels earning high freight, particularly where loss or damage is slight. See Christopher Sprague, *Damages for Personal Injury and Loss of Life - The English Approach,* 72 Tul. L. Rev. 975, 1011 (1997)

[541] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p. 38.

[542] Gold franc is defined as to refer to a unit consisting of 65.5 milligrams of gold of millesimal fitness 900. It was replaced by the special drawing right (SDR) of the International Monetary Fund by the 1979 Protocol to the 1957 Limitation Convention. Therefore, 66.67 SDR would substitute for 1,000 gold francs and 206.67 SDR for 3,100 gold francs. If both personal and property claims are involved, 140 SDR are reserved exclusively for personal claims. The Protocol simply changed the unit of account without taking inflation into account.

be deemed as 300 tons according to Article 3(5) of the 1957 Convention. However, the Convention allows the Contracting States to exercise the reservation to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.[543]

Nonetheless, the 1957 Convention has some serious weaknesses as far as the limitation fund is concerned. The leading problem is that, over the years, the limits provided by the Convention have been increasingly eroded by inflation and there is no in-built mechanism in the Convention to deal with it. This has given rise to a general dissatisfaction with the Convention and accordingly a request for drafting a new limitation Convention.

6.1.1.2 Under the 1976/1996 Convention

6.1.1.2.1 Under the 1976 Convention

The primary motives for drafting the 1976 Convention were to raise the limits of liability to a more realistic level and express them in a more value-stable unit of account, as well as coordinate the relationship between the global limitation system and some special limitation regimes in existence.

Similar to the 1957 Convention, the 1976 Convention established separate limitation funds for personal injury/death claims and property claims based on tonnage. However, the provisions concerning limits of liability under the 1976 Convention are very different from those under the 1957 Convention and the limits of liability are significantly higher.

While the 1957 convention established a flat rate for each ton of the vessel's tonnage, the 1976 Convention provides a sliding scale with various layers of limitation depending on the vessel's tonnage. Article 6 of the 1976 Convention sets out five layers for personal claims and four layers for property claims with each layer of the monetary amount getting less in proportion to the greater tonnage. The fund for personal injury/death claims is exactly twice the amount of the fund for other claims. The capacity for small ships capable of doing disproportionate damage has long been recognized and therefore the Convention provides the minimum tonnage for limitation purposes should be 500 tons.[544] As a result, small ships pay comparatively more per ton than large ships. The sliding scale is shown in the following tables:[545]

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[543] See 2(b) of Protocol of Signature of the 1957 Convention.

[544] Similarly, under the STOPIA 2006, the owner of a tanker entered in a Club which is a member of the International Group will, in the event of tanker spills in a Supplementary Fund member state, raise the minimum threshold of the owner's liability (where the Fund comes in) from SDR 4.51 million for a tanker not exceeding 5,000 tons to SDR 20 million, equivalent to the CLC 1992 limit of a tanker of 29,548 tons. This scheme is intended to relieve the IOPC Funds of the burden of claims handling in all cases where the claims do not exceed this level. It is hoped that this will result in the IOPC Funds again becoming involved only in major cases, except for those cases where the shipowner's liability insurance cover is inadequate or non-existent. See also 4.2.1.1 of Chapter 4 (oil pollution claims).

[545] See Article 6(1)(a)(b) of the 1976 Convention.

Table 1

Limits for Personal Claims	
Tonnage of Vessel	Units of Account
500 or less	333,000
	Each additional ton
501—3,000	500
3,001—30,000	333
30,001—70,000	250
In excess of 70,000	167

Table 2

Limits for Other Claims	
Tonnage of Vessel	Units of Account
500 or less	167,000
	Each additional ton
501—30,000	167
30,001—70,000	125
In excess of 70,000	83

Spill-over

The principle of preferential treatment of personal injury and/or death claims is also recognized in the 1976 Convention. Under the provisions of Article 6(2), if the limitation fund calculated for personal injury claims is insufficient to cover such claims in full, then the fund calculated for other claims is available to meet the unpaid balance of the personal injury claims and such unpaid balance shall rank ratably with other claims to share the limitation fund for those other claims.[546]

However, this spill-over provision creates some dilemma since it does not make clear how these two funds are to be used exactly. Although it is provided that the limitation fund for other claims is available for payment of unsatisfied personal claims, the situation where only personal claims are involved is not specifically mentioned. That is, in case there were no other claims but only personal claims, it is arguable whether there should be no property fund and according no spill-over for personal claims.

Under the 1957 Convention, the limits of liability are expressly provided for situations where either personal claims or property claims alone or both are involved. It is clearly provided that the spill-over applies only where both claims arise. Although the wording of Article 6(2) of the 1976 Convention is mainly taken from the 1957 Convention for the same purpose to give priority to personal injury claims, it is not so clear about the relationship between the two funds as that of Article 3 of the 1957 Convention.

Some authors suggest that the payment of the unsatisfied balance of personal injury claims against the property fund could equally well be allowed whether or not there are other claims.[547] However, the wording of Article 6(2) 'such unpaid balance shall

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[546] See Article 6(2) of the 1976 Convention.

[547] E.g., see generally Grahame Aldous, *Claims by Personal Injury and Fatal Accident Claimants on Property Funds in Limitation Proceedings*, L.M.C.L.Q. 150 (2003). The author firstly gave a detailed review of the legislative history and the *travaux preparatoires* of the Limitation Conventions. Then he

rank ratably with claims mentioned under Paragraph 1(b)' speaks for itself. It seems that the intention of the Convention should reasonably be construed as to allow the unsatisfied balance of personal injury claims to share the limitation fund for other claims only if there *are* such other claims, that is, the occurrence has given rise to both personal injury/death claims and other claims.[548]

Article 6(3) of the Convention preserves the option of a State Party to provide in its national law that claims in respect of damage to harbor works, basins and waterways and aids to navigation shall have priority over other claims. However, this is without prejudice to any claims for loss of life or personal injury against the fund. In other words, a State Party may not grant priority to such claims for damage to harbor works etc. over personal injury/death claims. Some States may well have exercised that option when incorporating the 1976 Convention into their domestic legislations.

6.1.1.2.2 Under the 1996 Protocol

Over the years, the limits of liability as provided under the 1976 Convention had likewise been seriously eroded by high inflation and proved increasingly inadequate to satisfy the claims of today. Furthermore, like its predecessor (i.e. the 1957 Convention), the Convention failed to include a mechanism whereby limits could be amended by a less formal procedure than the convening of a diplomatic conference. Therefore amendment to the 1976 Convention was put on the agenda with the main focus to increase the limits of liability. As a result, the Protocol of 1996 to amend the 1976 Convention which provides for much higher limits was finally drafted and approved.[549]

Under Article 3 of the Protocol, which replaces Article 6 of the 1976 Convention, the limits of liability have been substantially increased for all tonnages of vessels. A "tacit acceptance" procedure is introduced for updating these amounts.[550] Moreover, the minimum tonnage is increased from 500 to 2,000 tons with the result that the limits for small vessels are increased disproportionately. The reason for such increase is that the 1996 Protocol was being deliberated at the same conference as the Hazardous and Noxious Substances Convention of 1996, during which in consideration of the capacity for small ships capable of doing disproportionate damage, the minimum limitation tonnage in respect of HNS claims was determined to be 2,000 tons. In the interests of uniformity it was decided that the 2,000 tons minimum tonnage should be carried over into the limitation regime for general maritime claims. As a result, shipowners of small ships up to 2,000 tons are exposed to much higher levels of liability than they were under the 1976 Convention, which provided 500 tons minimum limitation tonnage.[551] Above the 2,000 tons minimum tonnage, funds

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construed Article 6(2) of the 1976 Convention as that a personal injury claimant against a shipowner is entitled to claim against both the personal injury fund and the property fund under the Convention with its "spill-over" claim ranks rateably with other claims on the property fund, even if there are no other claims giving rise to a property fund. .

[548] See Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, p.405.

[549] The 1996 Protocol entered into force on 13 May 2004.

[550] Article 8 of the Protocol introduces a quick amendment procedure, which intends to amend the limitation figures much more quickly in future when inflation or other circumstances require.

[551] By applying the new minimum tonnage and the increased limits under the 1996 Protocol, the owner of a 500-ton vessel will find his total liability for personal injury and property claims a six-fold increase.

increase on a per ton incremental basis. On average, limitation amounts for both personal injury claims and property claims under the 1996 Protocol increase by a factor of 2.3.[552]

The following tables exhibit the increased limits as contained in the Protocol:

Table 3

Limits for Personal Claims

Tonnage of Vessel	Units of Account
2,000 or less	2 million
	Each additional ton
2,001—30,000	800
30,001—70,000	600
In excess of 70,000	400

Table 4

Limits for Other Claims

Tonnage of Vessel	Units of Account
2,000 or less	1 million
	Each additional ton
2,001—30,000	400
30,001—70,000	300
In excess of 70,000	200

The 1996 Protocol maintains the provisions of Article 15(2) of the 1976 Convention allowing State Parties to make specific provisions in domestic laws for the limitation of liability of vessels which are ships intended for navigation on inland waterways or ships less than 300 tons.

Tonnage Measurement

As previously mentioned, under both the 1957 and 1976/1996 Limitation Convention the method of calculating the limitation fund is based on tonnage. Under the 1957 Convention, the tonnage of a powered vessel for limitation purposes was her registered tonnage (net tonnage) with the addition of any engine room space deducted from the gross tonnage for the purpose of ascertaining the net tonnage. In the case of all other ships, the net tonnage shall be taken as the basis for calculating the limitation fund.[553]

The 1976 Convention has adopted a completely different system for tonnage measurement from the 1957 Convention. By virtue of Article 6(5) of the 1976

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[552] Actually, analysis of relevant figures revealed that it would be necessary to apply a factor of three in order to restore the purchasing power of the limitation amounts fixed in the 1976 Convention. However, it was vigorously argued on behalf of shipowners and insurance interests that, in determining the amount of the increase, some account should be taken of the fact that a separate free-standing HNS Fund was being established which would take HNS-type claims out of the general limitation regime. This would reduce the demand on the general limitation fund and accordingly it would not be appropriate to adjust the 1976 Convention figures to the extent required to restore the value of the limitation funds. As a result, the increase finally agreed is less than originally expected particularly in relation to larger vessels.

[553] See Article 3(7) of the 1957 Convention.

Convention, the tonnage of a vessel for limitation purposes is the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969.[554] This Convention was the first successful attempt to introduce a universal tonnage measurement system. Many countries, including China, the U.K. and the U.S., are parties to this Convention. Previously, various systems were used to calculate the tonnage of ships. The Convention was drafted to ensure that tonnages calculated under the new system did not differ too greatly from those calculated under previous methods.[555] However, the re-measurement still has certain effects on the gross limitation tonnage. For instance, the gross tonnage of ro-ro ferries has been increased significantly; whereas that of single deck ships such as tankers and bulk carriers is found largely unchanged.

Unit of Account

Under the tonnage system, a uniform financial unit for calculating per ton value of vessel and its level of stability are very important for purposes of establishing the limitation fund in the international limitation system. The 1957 Convention expressed the limitation amounts in gold franc,[556] which units were then converted into the national currency of the country concerned. Whereas the 1976 Convention provides that the unit of account is the special drawing right (SDR), the value of which is to be determined in terms of pertinent national currencies at the date the limitation fund is constituted, payment is made or security is given. Those countries which are not members of the International Monetary Fund (IMF) are allowed to use an alternative monetary unit corresponding to one gold franc to determine the limitation amount. This unit is in turn to be converted into the national currency of the state in question.[557] Article 5 of the 1996 Protocol amends the provisions of the 1976 Convention by incorporating the new limitation tonnages and figures using monetary units for countries which are not members of the IMF but still want to use the gold franc calculation.

The principal reason for the change of the unit of account was that there had been

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[554] This Tonnage Measurement Convention entered into force on July 18, 1982. Under the Convention, every ship will have a gross tonnage and a net tonnage. The gross tonnage gives a realistic indication of the ship's size. Calculation is based on the moulded volume of the entire ship (hull, deck structures and all enclosed spaces) and there are no deductions, exemptions or special allowances. On the other hand, the net tonnage is intended to give a general indication of the ship's earning capacity. The net tonnage is derived from a formula based upon the moulded volume of the cargo spaces, the moulded depth of the ship, the summer draught and, in the case of passenger carrying vessels, the number of passengers which can be carried. See Patrick Griggs, *Limitation of Liability – the 1976 Convention and the 1996 Protocol*, Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton.

[555] The Convention provides phase-in period for the tonnage re-measurement to ensure that ships were given reasonable economic safeguards, since port and other dues are charged according to ship's tonnage. According to the Convention, vessels of more than 24 meters in length which are new and older vessels which, through modification, suffer a substantial variation in their existing gross tonnage, had to be measured according to the new regulations. Older ships could be re-measured according to the new regulations at the owners' request. With effect from July 18, 1994 all ships, whenever built, were required to be measured according to the new regulations. The phase-in period is by now well over.

[556] See Article 3(6) of the 1957 Convention.

[557] See Article 8 of the 1976 Convention. The relationship between the SDR and the gold franc is 1:15 as will be seen from a comparison between the limitation figures in Articles 6 and 8 of the Convention.

growing problems with conversion of gold francs under the 1957 Convention since the IMF abandoned gold as a basis for international finance in the 1970's and gold ceased, therefore, to have any official value. As a result, it is natural that SDR under the IMF was chosen as the financial unit for purposes of the limitation fund. The value of SDR is issued daily by the IMF on the basis of market exchange rates of a basket of currencies, including sterling, the euro, the U.S. dollar and the Japanese yen.[558] SDR have been adopted in a number of international conventions, such as the 1978 Hamburg Rules, the 1974 Athens Convention, the CLC/Fund Convention and the 1996 HNS Convention etc. The 1979 Protocol to the 1957 Limitation Convention also contains a provision on converting gold franc figures into SDRs.[559]

Although international limits of liability are expressed in terms of the SDR, this unit of account does not contain any in-built general adjustment for inflation to maintain real value. It merely reflects the relative values of currencies as between themselves. Therefore, daily fluctuations in the value of SDR will certainly affect the value of limits of liability.

6.1.2 Limits for Salvors

The 1976 Convention has introduced a completely new provision with regard to calculating the limits of liability for claims arising out of salvage services. As we know, the liability of the person entitled to limit shall be calculated by reference to the tonnage of the ship. Accordingly, when salvors' liability is incurred on board the salving vessel, the liability is calculated on the basis of the tonnage of the salving vessel involved. However, more than often, the salvor may be not operating from any ship, for example, the salvor working as a salvage officer in an office planning the salvage operation; or the salvor is operating solely on the salved ship, e.g., the *Tojo Maru* type salvage operation where the diver was working on the *Tojo Maru* seeking to bolt on a plate. It is thereby necessary to determine the tonnage under such circumstances for purposes of calculating the limitation fund, particularly since the salvors have been allowed to limit liabilities in their own right.[560]

Article 6(4) of the Convention specifically provides that the limitation of liability for any salvor not operating from any ship or for any salvor operating solely on the ship in respect of which he is rendering salvage services, shall be calculated by reference to a notional tonnage of 1,500 tons. This tonnage is assumed to represent the size of an average salvage tug.[561] Obviously, this 1,500-ton limit under the 1976 Convention is only applicable in the defined circumstances. The burden of proof of showing that one of these two alternative circumstances (not operation from any ship or operating solely on board the ship which they are trying to save) presumably falls upon the salvors seeking to limit.[562]

However, some anomaly may arise after the 1996 Protocol came into effect. Under the 1996 Protocol, the minimum tonnage for limitation purposes has been increased from

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[558] The value of the SDR as against most major national currencies can be found daily in the Financial Times and/or Lloyd's List. The rate published is that prevailing at close of business in Washington on the working day preceding publication.

[559] See Article 2 of the 1979 Protocol. The Protocol entered into force on 6 October 1984.

[560] See Article 1(1) of the 1976 Convention.

[561] See Article 6(4) of the 1976 Convention.

[562] Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, p.405

500 to 2,000 tons; nevertheless, the notional tonnage of 1,500 ton for salvors has remained unchanged. As a result, with the introduction of the new minimum tonnage, a salvor operating from a salving tug less than 2,000 tons is actually exposed to the same level of liability as a salvor not operating from a salving vessel who still relies on the deemed limitation tonnage of 1,500 tons.

As a matter of fact, salvage operations are often more complex in practice than the 1976 Convention appears to envisage. Probably there are various salvors engaged in different operations at different times on different vessels and in different places, some on board the casualty, some on salving vessels and others ashore. It is not an easy task to distinguish the exact location where the salvage operations occur, for example, whether operations are rendered from a vessel, and if so, from which vessel, especially when the operations involve numerous ships. As a result, it would be difficult to determine the applicable limitation tonnage for purposes of salvor's limitation fund.

Perhaps the solution is to look at the time and place where the salvor's negligence occurred and locate the offending vessel(s). If part of the negligence found against the salvor comes within the circumstances provided in Article 6(4),[563] and part of the negligence not (i.e. the negligence is also caused by the salving vessel), it would seem that the two separate funds (i.e. the 1,500-ton limit and the general limit based on the tonnage of the salving vessel) should be added together to determine the salvor's limitation fund.[564] Furthermore, when the salvage operations involve a salvage flotilla, the limitation fund for the salvor would be calculated by reference to the aggregate tonnage of the tug(s) or vessel(s) at fault during the salvage operation.[565]

6.1.3 Limits for Passenger Claims

6.1.3.1 Under the 1976/1996 Convention

Article 7 of the 1976 Convention further introduced a completely separate limitation fund only in respect of claims for loss of life or personal injury to passengers.[566] The 1957 Convention does not contain the corresponding provisions. Thus, passenger claims for personal death or injury do not need to share the general limitation fund with other claims.[567] This limitation fund, instead of calculated on the basis of the vessel's tonnage, is ascertained by multiplying 46,666 SDR by the number of passengers which the ship is certificated to carry, but subject to a maximum of

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[563] For example, the salvage operations are conducted by a salvage officer from office ashore and he does so negligently, or the salvage officer is on board the casualty and acts negligently.

[564] See Geoffrey Brice, *Salvorial Negligence in English and American Law*, 22 Tul. Mar. L.J. 569, 580 (1998)

[565] See, e.g., *The Bramley Moore* [1963] 2 Lloyd's Rep. 429; *The Sir Joseph Rawlinson* [1972] 2 Lloyd's Rep. 437.

[566] For the purpose of calculating this special limitation fund for passenger claims, passengers are defined by Article 7(2) of the 1976 Convention as any person carried in the ship either under a contract of passenger carriage, or who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods. Generally speaking, passengers shall not include crewmembers and those working on board the vessel under contracts of employment with the owner or carrier. Visitors, guests or stowaways are also excluded from the category of passengers.

[567] However, claims for loss or damage to passengers' property are still subject to the general limits of liability.

25,000,000 SDR.[568] Apparently, the maximum figure would only come into operation when the authorized passenger capacity exceeds 535 passengers.

It should be noted that Article 4 of the 1996 Protocol has replaced Article 7(1) of the 1976 Convention in respect of limits for passenger claims and put forward two important changes.[569] The first is that the limits for passenger claims are increased from 46,666 SDR to 175,000 SDR. This nearly four-fold increase is fixed mainly based on the consideration to restore the purchasing power of the limitation amounts provided in the 1976 Convention.

The second significant change is that the 1996 Protocol has removed the cap of 25 million SDR. Thus, the limits of liability for passenger claims under the Protocol are calculated solely by multiplying 175,000 SDR by the number of passengers which the vessel is certificated to carry. It is obvious that the removal of the cap would affect vessels certificated to carry more than 142 passengers. As a result, shipowners and operators of large cruise ships or ferries which are growing with high carrying capacity are faced with much higher liability under the new regime, since the limitation fund is only determined by the certified carrying capacity of the vessel.

Besides the above amendments for passenger claims, the 1996 Protocol also includes a new provision as Paragraph 3*bis* in Article 15 of the 1976 Convention.[570] This new provision, introduced at the insistence of the Japanese delegation to the Diplomatic Conference, allows individual states to adopt by their own national law even higher limits of liability or unlimited liability for passenger claims for loss of life or personal injury. This amendment to Article 15 reflects the international concern on the issue of maritime limitation of liability in respect of personal injury and death claims. Nonetheless, it is submitted that such a provision may have inadvertently allowed further room for variation in the limitation regime between different states and defeat the desired goal towards international unification of the law relating to limitation of liability. As a result, it might further encourage forum shopping.[571]

6.1.3.2 Athens Convention

To the extent that Article 7 of the 1976/1996 Limitation Convention deals with limitation of liability for passenger claims, confusion may arise since the 1974 International Convention on the Carriage of Passengers and their Luggage (Athens Convention) also deals with limitation of liability to passengers.[572] Apparently, there is an overlap between the contrasting limitation provisions of the two Conventions.

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[568] See Article 7(1) of the 1976 Convention.

[569] The pertinent Article provides: "In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship; the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate."

[570] Article 6 of the 1996 Protocol provides: 3*Bis* "Notwithstanding the limit of liability prescribed in paragraph 1 of Article 7, a State Party may regulate by specific provisions of national law the system of liability to be applied to claims for loss of life or personal injury to passengers of a ship, provided that the limit of liability is not lower than that prescribed in paragraph 1 of Article 7".

[571] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p.69-71.

[572] The Athens Convention came into force internationally on April 28, 1987.

The Athens Convention establishes a liability regime for damage suffered by passengers carried on a seagoing vessel and creates a completely separate regime for limitation of liability with respect to the international carriage of passengers by sea. Article 7(1) of the 1974 Athens Convention provides a limit of 700,000 francs per carriage for passenger's death or injury. This figure was subsequently replaced by the limit of 46,666 SDR by virtue of the 1976 Protocol, which is the same figure as provided in Article 7(1) of the 1976 Convention.[573] The Convention allows a State Party to increase the limits for its own carriers in the national legislation.[574] Furthermore, the provisions concerning the loss of the right to limit liability under the 1974 Athens Convention are similar to those in the 1976 Limitation Convention, i.e. intentional or reckless act with knowledge.

The 2002 Protocol

The liability limits expressed in the original Athens Convention have been generally regarded as too low to ensure adequate protection for passengers on vessels. Accordingly, the 1974 Athens Convention was amended by the 1990 Protocol, which was aimed to raise the limitation amount for passenger claims in case of death or injury to 175,000 SDR. This limitation figure was used in the revised Article 7(1) of the 1976 Convention. However, the 1990 Protocol has not entered into force and virtually was being superseded by the 2002 Protocol. The 2002 Protocol has further raised the limits of liability substantially to reflect conditions nowadays in favour of passengers and provided a minimum amount of insurance cover for passenger claims.[575] Importantly, State Parties are allowed to impose by specific provisions of national law higher limits of liability or even unlimited liability for passenger claims for personal injury and death.[576] Based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution, the 2002 Protocol introduces a liability regime favorable to passengers carried by sea, including adoption of a strict liability system for shipping incidents to replace fault-based liability regime, and compulsory insurance to cover passengers on ships coupled with provision for a right of direct action against insurers.[577] Furthermore, to make any raise of limits easier in the future, the 2002 Protocol introduces a new tacit acceptance procedure for amending the limitation amounts under the Convention.[578]

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[573] The 1976 Protocol to the Athens Convention entered into force on 30 April 1989.

[574] See Article 7(2) of the 1974 Athens Convention, which provides "... the national law of any State Party to this Convention may fix, as far as carriers who are nationals of such State are concerned, a higher per capita limit of liability".

[575] The 2002 Protocol has not come into force yet. Under the Protocol, the liability of the carrier for the passenger's death or injury is limited to 250,000 SDR per passenger on each distinct occasion. If the loss exceeds the limit, the carrier is further liable - up to a limit of 400,000 SDR per passenger on each distinct occasion - unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

[576] It is doubtful whether the possibility of allowing unlimited liability for personal injury/death claims would in practice afford any additional protection for passengers, since the liability insurers may cap their liability on the compulsory insurance level. Even though the carrier would still be liable for passenger claims exceeding the compulsory insurance level, it would be difficult for a carrier that did not take additional insurance to respond to such claims, except perhaps by winding up.

[577] A new Article *4bis* of the Protocol requires carriers to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the limits for liability (not less than 250,000 SDR per passenger on each distinct occasion) under the Convention in respect of personal injury/death to passengers.

[578] Indeed some may argue that erosion of the limitation privilege by very high limits and strict liability threatens shipowners and insurers with financial ruin and will therefore frustrate trade.

Certainly efforts should be taken to have the 2002 Protocol brought into force on a wide scale as soon as possible. However, the required compulsory insurance, that is, the general limits set out up to a maximum of 250,000 SDR per passenger, is possibly well beyond the capacity of established insurance markets, particularly regarding the very large cruise vessels. The risk is too great and not mutual in nature in that passenger vessels constitute a very small share of the tonnage entered in the clubs.[579] Moreover, the insurance markets can provide very limited insurance cover for losses caused by terrorism which is required under the Protocol. The existing War Risks Cover would not meet the Protocol's insurance requirements. As a result, governments have found themselves unable to ratify the Protocol, since they cannot satisfy its insurance requirements. Thus, some arrangements needed to be made to enable P & I clubs to continue providing satisfactory insurance cover for passenger liabilities.[580]

Since 2002, various discussions have been carried on in an effort to find a formula to bridge the gap and enable the ratification of the 2002 Protocol in the reasonably near future. In October 2006, the IMO Legal Committee adopted Guidelines for the implementation of the Athens Convention 2002. The Guidelines confirm a broad consensus that the Athens Convention 2002 should now be ratified and enter into force. The adoption of the Guidelines represents a far reaching spirit of compromise among the governments, the shipowners and the insurers. They align the requirements of the 2002 Protocol with the insurance available by some innovative drafting at an international law level. The Guidelines consist of one part containing a model reservation clause that States should use when ratifying, and another part that sets out the views of the Legal Committee concerning which insurance is available. The model reservation resolves the problems that the new Convention was somewhat too ambitious in respect of insurance cover, i.e. the insurance level required by the Convention and coverage for the terrorism-related risk. Thus, the Guidelines enable passengers to benefit from an improved regime and ensure uniformity between the states parties which adopt this form of reservation.[581]

Limitation Convention and the Athens Convention

In spite of some similarities between the Athens Convention and the 1976/1996 Limitation Convention, there are important differences between the limitation provisions of the two Conventions. The limits in Article 7(1) of the Athens Convention are to apply to each passenger claiming damages. That is, the limit under the Athens Convention is calculated by multiplying the limitation figure by the number of passengers who are actually on board and suffer personal injury or death. Therefore the extent of an owner's liability under the Athens Convention will vary depending on the number of passengers claiming. Whereas under the 1976/1996 Limitation Convention, the limit of liability shall be an amount of 46,666 SDR/175,000 SDR multiplied by the number of passengers which the ship is

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[579] Mutual insurance, as available through club system, provides a more reliable source of cover because the member shipowners have a mutual interest in the future of shipping.

[580] See generally Baris Soyer, *Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage at Sea 1974*, 33 J. Mar. L. & Com. 1 (2002).

[581]. See Erik Røsag, *Light at the End of the Tunnel for Passengers*, 12 Journal of International Maritime Journal 297 (2006)

authorized to carry according to its certificate. That is, the limitation fund under the 1976 Convention is not related to the number of passengers actually claiming, but instead, determined by the number of passengers that a ship is certificated to carry. Therefore, the total limit of the shipowner is a definite figure.[582]

Furthermore, under the 1974 Athens Convention, the limit established applies per 'carriage' which is defined in Article 1(8) as being the whole period over which the passenger is being carried. Therefore, if the passenger was injured twice during the course of a voyage, the passenger limits set out in Article 7(1) of the Athens Convention would only apply once because both injuries occurred during the same carriage. Whereas under the 2002 Protocol to the 1974 Athens Convention, the limit established applies "on each distinct occasion". Similarly, the limit set out in the 1976/1996 Convention also applies "on any distinct occasion". Therefore, the passenger limit would possibly apply more than once if there are two or more distinct occasions on the particular voyage.[583]

Since both the 1974 Athens Convention and the 1976/1996 Limitation Convention contain passenger limitation provisions, question would inevitably arise as to which Convention limit would govern in the event of an incident where passenger's death or injury is involved. The terms of Article 14 and 19 of the Athens Convention are decisive in solving this conflict. Article 14 of the Athens Convention provides that: "No action for damages for the death of or personal injury to a passenger, or for loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention." Article 19 of the Athens Convention provides that: "This Convention shall not modify the rights or duties of the carrier, the performing carrier, and their servants or agents provided for in international conventions relating to the limitation of liability of Owners of seagoing ships." Therefore, Article 14 clearly requires that the 1974 Athens Convention govern passenger claims; however, Article 19 preserves the rights of the carrier under the Limitation Convention.

It has been suggested that the combined effect of these two provisions is to require all passengers to present their claims in accordance with the provisions of the Athens Convention. Nonetheless, the carrier can further limit his liability where the total amount payable to individual claimants after applying the limits under the Athens Convention exceeds the global fund calculated in accordance with Article 7 of the 1976 Convention.[584] In other words, this second right of limitation provided in the 1976 Convention will arise only when the total individual claims after applying the Athens Convention per capita limits exceeds the global passenger limits under the 1976 Limitation Convention.[585]

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[582] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p.69-71.

[583] As to the construction of "on any distinct occasion", see 6.1.4 of this Chapter.

[584] Christopher Sprague, *Damages for Personal Injury and Loss of Life - The English Approach,* 72 Tul. L. Rev. 975, 1019 (1997). The nearest approach to what might have become a test case was the tragic accident of the *Herald of Free Enterprise*. But the matter did not come before the court on the subject of limitation of liability.

[585] The owner may limit his liability only once in accordance with the provisions of the 1976 Limitation Convention, if he is not the carrier. This double capping is similar to that which would operate where there were package limits under the Hague/Hague-Visby Rules/Hamburg Rules and global limits under Article 6 of the 1976/1996 Convention. It has been argued that this double capping

6.1.4 On any Distinct Occasion

Both the 1957 and 1976 Limitation Conventions provide that a shipowner is entitled to limit his liability to the aggregate of all claims which arise on any distinct occasion, despite there are some differences of the language. The 1957 Convention refers in general terms to "… the aggregate of personal claims and property claims…"[586]. Whereas the 1976 Convention expressly lists the types of claims that are to be aggregated on each distinct occasion, since the specific rules concerning claims against salvors and by passengers are incorporated in the Convention.[587]

It is not easy to determine whether multiple different accidents should be taken as occurring on one distinct occasion or not, especially when they are in some way linked. The general rule is that, where successive accidents occur solely as a result of the same negligent act, all constitute one distinct occasion. However, if there is time and opportunity between the accidents to take action which would avoid the second accident, that is, the second accident breaks the chain of causation, there are clearly two distinct occasions, and accordingly the owner of the offending vessel has to establish two limitation funds.[588]

The case law has provided some guideline in the construction of the proper meaning of distinct occasion. For example, in *The Lucullite*,[589] it was found there were distinct acts of negligence causing damage to two different ships respectively, and the second collision was not the necessary or inevitable consequence of the first. The two collisions arose on two distinct occasions for limitation of liability purposes. As a result, the shipowner had to establish separate limitation funds for each distinct occasion. In contrast, in *The Harlow*,[590] two successive collisions were involved. The second collision occurred after the vessel *Harlow* collided with the vessel *Dalton* and attempted to make a turn in the river with her engines still running at full speed. The court held that the second collision occurred on the same occasion as the first. Accordingly, the owners were required to put up only one limitation fund for both claims for damages.

As a matter of fact, the construction of the phrase "distinct occasion" would usually depend on the court discretion upon taking all the relevant factors into consideration. For example, in a Norwegian case,[591] there was disagreement among the justices of

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appears to be more equitable in the context of property claims covered by insurance than in the context of personal claims which are normally uninsured. See Nicholas Gaskell, *The New LLMC 1996 Limits and Limitation for Passenger Claims*, Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton.

[586] See Article 2(1) of the 1957 Convention.

[587] See Article 9 of the 1976 Convention

[588] Robert Grime, *Shipping Law*, London: Sweet & Maxwell Ltd., 2nd. ed., 1991, p.268.

[589] [1929] 33 L.L.Rep. 186. The vessel *Lucullite* had been negligently moored alongside another vessel in heavy weather. The rough sea caused the *Lucullite* to range against the other vessel causing serious damage to that vessel. The *Lucullite* cast off and, in the course of manoeuvring, struck another vessel which later sank. The owners of the *Lucullite* asserted that the damage to the two vessels arose on one distinct occasion.

[590] (1922) 13 Ll.L.Rep. 311

[591] RT. 1987 P. 1369. The dispute arose as a ship delivered gas oil to several fishing vessels at the fishing ground. The supply ship had previously carried fishery products, and its holds had not been properly cleaned. Due to pollution of the oil, two of the recipients had engine failures. The gas oil had

the Supreme Court with the question whether the incident should be taken as one or two occasions in the context of the 1976 Convention. The minority of two Justices found that the difference in time and venue, and also that the oil had been stored in two different tanks, especially designated for the quantities ordered by each vessel, made the incident two separate occasions. In the preparatory works to the statute, it was pointed out that there had to exist an internal connection for different damages to be taken as one occasion. The minority did not find such a connection between the deliveries. The majority of three Justices, however, found this connection existing. The oil was ordered jointly, and to the same fishing ground. What was important was that the damages arose from the same act of negligence, namely the insufficient cleaning of the tanks on the carrier. The losses therefore originated from one occasion. The shipowner was consequently entitled to limit to one limitation fund.

6.1.5 Tug and Tow Situation

It is usually more complex when calculating the limitation fund in respect of the tug and tow situations, since the damage may be occasioned by the tug alone or by the ship under tow or by a combination of the two. The limitation fund of the tug is often fairly small as tugs are often small vessels, while some categories of commercial barges may be of substantial tonnage. Thus, the question arises as to which vessel(s)' tonnage should be taken into account as the basis for calculating the limitation fund, the tug or the tow alone, or the aggregation of the tonnages of both the tug and the tow. Neither the 1957 Limitation Convention nor the 1976 Limitation Convention addresses this issue directly when accidents involving tug and tow occur.

In this respect, jurisprudence has indicated that the idea of treating the tug and tow as one unit has been firmly rejected.[592] Instead, the courts have developed the general principle that only the tonnages of those vessels whose negligence caused the damage shall be taken into account when calculating the limitation fund. Thus, if only the tug is at fault, the tug's owner is entitled to limit in accordance with the tonnage of his tug; if only the tow is at fault, the owner of the tow may limit in accordance with the tonnage of the tow; if both the tug and the tow are at fault, then aggregation of their limits will be involved, with each owner being entitled to limit on the tonnage of his own vessel if the tug and tow are in different ownership.[593] In a word, causative negligence on the part of whichever vessel is mainly the governing criterion for purposes of calculating the limitation fund.

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been ordered at the same time and delivered on the same voyage, but at two different sites to two different recipients, with an interval of 24 hours.

[592] See, e.g., *The American and The Syria* [1874] L.R. 6 P.C. 127; *The Englishman and the Australia*, [1894] P. 239; *The Morgengry and The Blackcock*, [1900] P. 1, C.A; *The Devonshire*, [1912] A.C. 634, H.L.; *The Quickstep*, [1890] 15 P.D. 196; *The Umona*, [1914] P. 141; *The Ran; The Graygarth*, [1922] P. 80, C.A.; *The Vigilant*, [1921] P. 312, (1921) 7 Ll.L.Rep. 232; *The Ant*, [1924] 19 Lloyd's Rep 211; *The Freden*, [1949/1950] 83 Lloyd's Rep. 427; *The Sir Joseph Rawlinson*, (1972) 2 Lloyd's Rep. 437; *The Bramley Moore* [1963] 2 Lloyd's Rep. 429; *The Rhone v. The Peter A.B. Widener*, (1993) 1 S.C.R. 497 (S.C.C); and *The Smjeli* [1982] 2 Lloyd's Rep. 74.

[593] See Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, p. 394; S. Rainey, *The Law of the Tug and Tow*, London: L.L.P., 2nd. ed., 2002, Chap. 8; *The Bramley Moore,* [1963] 2 Lloyd's Rep. 429, 436. There are many works which deal with the subject in detail and give a particular analysis of each individual situation. See, e.g., Geoffrey Brice, *Maritime Law Of Salvage*, London: Sweet & Maxwell Ltd., 4th ed., 2003; Alex L. Parks & Edward V. Cattell, Jr., *The Law Of Tug, Tow, & Pilotage*, Cornell Maritime Press, 3rd. ed., 1994; David W. Steel & Francis D. Rose, *Kennedy & Rose Law of Salvage,* London: Sweet & Maxwell Ltd., 6th. ed., 2001.

For instance, in *The Alde*,[594] the barge *Alde* forced a second barge into collision with a steamship damaging the second barge and the steamship. The owners of the *Alde* were allowed limitation of liability based upon the tonnage of the *Alde* alone, since the *Alde* was found solely to blame and the second barge had not been negligently navigated.

Similarly, in the authoritative case of *The Bramley Moore*,[595] a collision occurred between a powered vessel and a dumb unmanned barge in tow of a tug, which also had a further barge lashed alongside. It was held by Lord Denning that the owners of the tug could limit by reference to the tonnage of the tug alone because the damage had been caused by reason of negligent navigation of the tug and not of the barge. The dumb barge was absolved of blame.[596]

The Bramley Moore was a case in which the tug and tow were in different ownership. However, there should be no differentiation whether the tug and tow are in the same ownership or not in dealing with such circumstances, although the situation might be more complex. In *The Sir Joseph Rawlinson*,[597] the tug and tow were in the same ownership. The court, following the reasoning in *The Bramley Moore*, held that the tug owners were entitled to limit their liability by reference to the tonnage of the tug alone when a dumb barge in tow of the tug had collided with a third vessel. The causative negligence was the negligence in the navigation of the tug and not of the dumb barge. The rule against aggregation of tug and tow tonnage for limitation purposes applies even where there is common ownership of tug and tow. Aggregation of tonnage is allowed only where both tug and tow cause or contribute to the loss or damage.[598]

Similarly, in *The Harlow,*[599] the tug and five dumb barges in tow were in common ownership. It was held that the owners were allowed to limit liability by reference to the aggregate tonnages of their tug and two barges at fault (the barge actually involved in the collision and another barge which added its momentum so as to contribute to the damage). Each of those three vessels had been improperly navigated by the owners' servants.[600][601]

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[594] [1926] P. 211.

[595] [1963] 2 Lloyd's Rep. 429

[596] Lord Denning said, "The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice." See *The Bramley Moore*, [1963] 2 Lloyd's Rep. 429, 438.

[597] [1972] 2 Lloyd's Rep. 437. A collision occurred between a third vessel *Sir Joseph Rawlinson*, and both tug and barge, most of the damage being caused by the impact with the barge. The barge was not at fault, so the only question was whether the circumstances of the tug and her tow being in the same ownership enabled the aggregation of the two tonnages.

[598] See Michael Thomas, *British Concepts of Limitation of Liability*, 53 Tul. L. Rev. 1205, 1238 (1979)

[599] (1922) 13 Ll.L.Rep. 311. The tug was towing five dumb barges when a collision occurred between a third vessel and one of the barges. Another of the barges contributed to the damage by its weight and momentum.

[600] See also, *The Englishman and the Australia* [1894] P. 239; *The Freden* [1949/50] 83 Ll.L.Rep. 427; *The Smjeli* [1982] 2 Lloyd's Rep. 74. See generally, W. Archie Bishop, *The Relationship Between The Tug And Tow In The United Kingdom*, 70 Tul. L. Rev. 507 (1995).

[601] However, it seems that Canada has traditionally adopted the "flotilla principle" to deal with the tug and tow situation. The leading Canadian case on this issue was the decision of the Canadian Supreme

Indeed, under the 1957 Convention where the concept of causative negligence arose in the "navigation or management of the ship"[602], the courts in both *The Bramley Moore* and *The Sir Joseph Rawlinson* were faced with some dilemma. That is, if the crew of the tug were navigating both tug and tow and the causative negligence occurred in the navigation of both, it might follow that there would be unlimited liability in respect of the navigation of the tow, if the tug and tow were in different ownership. Certainly this dilemma has been removed by the much more open wording of the 1976 Convention where the right to limit exists if the liability arose "in direct connection with the operation of the ship", "whatever the basis of liability may be".[603] Furthermore, because of the change of wording, there might be fewer reasons under the 1976 Convention to calculate the limitation fund to the tonnage of the tug alone.

6.2 Under the Domestic Legislations

6.2.1 Under the U.K. Law

6.2.1.1 General Limits

The U.K has traditionally used the pre-casualty value of the vessel as the basis for calculating the limitation fund. The first statute governing limitation of shipowner's liability, i.e. Responsibility of Shipowners Act of 1733, allowed a shipowner to limit his liability for certain types of claim to the value of the ship plus her freight immediately prior to the casualty. By virtue of Merchant Shipping Acts 1854 and 1862, the U.K. departed from the value-based system and established the tonnage regime as the basis of limitation of liability. From then on, all the subsequent limitation legislations have been based upon the tonnage system. The first comprehensive tonnage regime was found in the Merchant Shipping Act 1894. This Act provided that the total limit of liability for each occasion was £15 per ton of the ship's tonnage, of which £7 per ton was reserved for personal claims, and the remaining £8 per ton was shared proportionally by both property claims and personal claims.

The Merchant Shipping (Liability of Shipowners and Others) Act 1958 adopted the provisions of the 1957 Limitation Convention which basically contains a revised version of the British tonnage system. Accordingly, the Act provided the same limits of liability of 3,100 and 1,000 gold francs per ton for personal injury claims and property claims respectively.[604] The arguable unfairness of the right to limit was

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Court in *The Rhone v. The Peter A.B. Widener*. The Court affirmed the flotilla principle, i.e. the limitation fund should be calculated on the combined tonnage of the tug and tow provided the tug and tow were in common ownership. This traditional Canadian "flotilla principle" differs from the position as elaborated in *The Bramley Moore* and *The Sir Joseph Rawlinson*, whereby, if the negligent navigation that caused the collision occurred aboard the tug alone, only the tonnage of the tug is taken into account for limitation purposes, regardless of whether or not the tug and the tow are commonly owned. See, e.g., *The Rhone v. The Peter A.B. Widener*, [1993] 1 Lloyd's Rep. 600, [1993] 1 S.C.R. 497; *Bayside Towing Ltd v. Canadian Pacific Railway*, [2000] 3 F.C. 127, 2000 AMC 1277; [2001] 2 F.C. 258, 2002 AMC 243; *Canadian Pacific Railway Co. v. The Sheena M*, [2000] F.C.J No.1953.

[602] See Article 1 of the 1957 Convention.

[603] See Article 2(1) of the 1976 Convention.

[604] The 1979 Protocol to the 1957 Convention that replaced the gold franc with SDR was given effect in the U.K. by the Merchant Shipping Act 1981 as effective from 29 November 1984.

mitigated to some extent in the case of small ships by the provision in Section 1(1)(a) of the 1958 Merchant Shipping Act which provided a minimum tonnage of 300 tons that applied only to the life fund when personal injury claims were involved. In other words, in the case of personal injury/death claims, where the tonnage of the offending vessel is less than 300 tons, the tonnage of the vessel will be taken to be 300 tons. However, the minimum tonnage provision does not apply to property claims, whether alone or together with the personal injury claims.

Later on, the 1976 Limitation Convention was incorporated into the U.K. law by the Merchant Shipping Act 1979, Section 17, Schedule 4,[605] and effective in the U.K. as from December 1, 1986. The same Convention was denounced by the U.K. government as of May 13, 2004, the same day that the 1996 Protocol to the 1976 Limitation Convention became effective in the U.K.[606] Therefore, the limits of liability under the U.K. limitation law are the same as provided by the 1996 Protocol except some slight changes by virtue of the exercise of the right of reservation which will be addressed below.

Article 6(1) of the 1976 Convention provides that the minimum tonnage for purposes of calculating an owner's limit of liability is 500 tons. Prior to the coming into force of the 1996 Protocol, the U.K. government, relying upon a right of reservation contained in Article 15(2)(b) of the Convention, has reduced the minimum tonnage to 300 tons in order to protect small shipowners.[607] Therefore, for vessels with a tonnage between 300 and 500, the limits of the Convention for vessels not exceeding 500 tons apply. For vessels with a tonnage below 300 tons, special limits for small ships apply. To be specific, for loss of life/personal injury claims, the limit is 166,667 SDRs; for any other claims, it is 83,333 SDRs; and where both types of claim are involved, the limit is 250,000 SDRs. These figures are half of the limits set for vessels with tonnage not exceeding 500 tons in the 1976 Convention. The limits of liability prior to the 1996 Protocol being effective in the U.K. are shown in the following tables:

Table 5

Limits for Personal Claims	
Tonnage of Vessel	Units of Account
300 or less	166,667
300--500	333,000
	Each additional ton
501—3,000	500
3,001—30,000	333
30,001—70,000	250
In excess of 70,000	167

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[605] The 1979 MSA was repealed. Currently the pertinent provisions can be found in the Merchant Shipping Act 1995, Section 185 and Schedule 7.

[606] See Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998, which entered into force on May 13, 2004. The 1998 Order implements the 1996 Protocol to amend the 1976 Convention, by amending the articles of the 1976 Convention as set out in Part I of Schedule 7 to the Merchant Shipping Act 1995 corresponding to the amendments made by the Protocol, and also by amending the provisions having effect in connection with the Convention in Part II of that Schedule.

[607] See paragraph 5 of Schedule 7, Part II, and section 185 of the 1995 Merchant Shipping Act.

Table 6

Limits for Other Claims	
Tonnage of Vessel	Units of Account
300 or less	83,333
300--500	167,000
	Each additional ton
501—30,000	167
30,001—70,000	125
In excess of 70,000	83

The 1998 Amending Order provides for the implementation of the 1996 Protocol to the 1976 Limitation Convention following its ratification by, and entry into force for, the UK. Despite the 1996 Protocol has increased the minimum tonnage from 500 tons to 2,000 tons, the U.K. government has again exercised the same reservation provided for in Article 15(2)(b) of the 1976 Convention and maintained the 300-ton minimum tonnage when it adopted the 1996 Protocol. However, for vessels less than 300 tons, the limits of liability have been increased to 1,000,000 SDRs in respect of personal injury claims and 500,000 SDRs in respect of other claims.[608] Vessels above 300 tons will have a limitation fund based on the new minimum of 2,000 tons. The following tables exhibit the increased limits under the current law:

Table 7

Limits for Personal Claims	
Tonnage of Vessel	Units of Account
300 or less	1 million
300--2000	2 million
	Each additional ton
2,001—30,000	800
30,001—70,000	600
In excess of 70,000	400

Table 8

Limits for Other Claims	
Tonnage of Vessel	Units of Account
300 or less	500,000
300--2000	1 million
	Each additional ton
2,001—30,000	400
30,001—70,000	300
In excess of 70,000	200

As indicated previously, Article 6(3) of the 1976 Convention grants the option to provide in the national law that claims in respect of damage to harbor works, basins and waterways and aids to navigation shall have priority over other claims. It is noteworthy that the U.K. has omitted this provision in its 1995 Merchant Shipping

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[608] See Paragraph 5(1) of Part II of the 1998 Amending Order.

Act.[609] Therefore, under the U.K. law, claims for harbor works will share the limitation fund with other property claims proportionally.

With regard to the tonnage measurement, similar to the 1976 Limitation Convention, the limitation tonnage under the U.K. law is the gross tonnage calculated in accordance with the tonnage measurement rules contained in the International Convention on Tonnage Measurement of Ships 1969, which was implemented in the U.K. by the Merchant Shipping (Tonnage) Regulations 1982.[610] According to the Regulations, all ships of more than 24 meters in length are required to be measured pursuant to the new Regulations. Insofar as vessels of less than 24 meters in length are concerned, the pre-1982 system of measurement remains in force.

6.2.1.2 Limits for Salvors

Following the provisions of the 1976/1996 Limitation Convention, under the U.K. limitation law, the limits of liability for salvors are to be calculated depending on where the salvage operations occur. The limitation fund shall be calculated on the basis of a notional tonnage of 1,500 tons if the salvor is not operating from any ship or operating solely on the ship to, or in respect of which, he is rendering salvage services.

6.2.1.3 Limits for Passenger Claims

According to Article 7 of the 1996 Protocol, in respect of claims arising on any distinct occasion for personal injury or death to passengers of a ship, the limit of liability of the shipowner shall be calculated by multiplying 175,000 SDR by the number of passengers which the ship is certificated to carry. However, states are given discretion to regulate by specific provisions of national law the system of limitation of liability to be applied to passengers.[611] The U.K. government took advantage of this option and provides in the 1998 Amending Order that there is no overall limit for claims arising from loss of life or injury to passengers of seagoing ships. In effect, the passenger on a seagoing ship would not be faced with a limit based upon Article 7 of the 1996 Protocol. However, such claims are subject to the separate per capita limits of liability under the provisions of the 1974 Athens Convention which are set out in Schedule 6 to the 1995 Merchant Shipping Act. Besides, the 1998 Order also provides that passenger claims in respect of non-seagoing ships are similarly subject only to a per capita limit.[612] The intention seems to be that by incorporating the 1996 Protocol

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[609] It is presumed that the U.K. legislature has no intention of ever taking advantage of such an option. See Patrick Griggs, *Limitation of Liability for Maritime Claims: the Search for International Uniformity*, L.M.C.L.Q. 369, 375 (1997).

[610] The 1982 Regulations, replacing the previous Merchant Shipping (Tonnage) Regulations 1967 which applied the tonnage calculation in the 1957 Limitation Convention, came into force on July 18, 1982. The 1982 Regulations was replaced by the Merchant Shipping (Tonnage) Regulations 1997.

[611] See Article 15*(3bis)* of the 1996 Protocol.

[612] See Paragraph 6 of Part II of the 1998 Amending Order:

6. (1) Article 7 shall not apply in respect of any seagoing ship; and shall have effect in respect of any ship which is not seagoing as if in paragraph 1 of that article
   (a) after "thereof" there were inserted "in respect of each passenger", and
   (b) the words from "multiplied" onwards were omitted.

Therefore, the limits for passenger claims in the 1996 Protocol are not applicable to those passenger claims in respect of seagoing ships; whereas passenger claims in respect of non-seagoing ships are subject to the limit of 175,000 SDR per passenger. This is aimed to put passengers on non-seagoing into the U.K. law, passenger claims arising out of incidents involving ships, whether seagoing or not, will not be subject to the passenger limits contained in the 1996 Protocol. Accordingly, only those personal injury/death claims arising out of maritime casualties that are not involving passengers will be governed by the 1996 Protocol. As a result, those passenger claims that are subject to U.K. law will not face a double cap.[613] Certainly, it is possible that conflicts of jurisdiction might arise between the U.K and other state parties that adopt Article 7 of the 1996 Protocol.

In the U.K., the 1974 Athens Convention which governs liability and limitation in respect of passenger claims arising from carriage by sea was originally given the force of law by virtue of Section 14 of the Merchant Shipping Act 1979 on April 30, 1987 and was annexed as Schedule 3 to that Act. Prior to that date, the U.K. gave the Convention the force of law domestically with effect from January 1, 1981. The Athens Convention is now incorporated into the U.K. law by Section 183 of the 1995 Merchant Shipping Act and the text of the Convention is set out in Schedule 6 to that Act. Like in the Athens Convention, the limit for passenger's death or injury claims was originally 700,000 gold francs per passenger per carriage. As the Convention allows a State Party to increase the limits for its own carriers,[614] this figure is increased to 1,525,000 gold francs for carriers whose principal place of business is in the U.K. with effect from June 1, 1987.[615] In 1989, the two limits of 700,000 gold francs and 1,525,000 gold francs were substituted by limits of 46,666 SDR and 100,000 SDR respectively as a consequence of the coming into force of the 1976 Protocol to the Athens Convention which replaces the unit of account of gold francs by SDR.[616] Since the attempt to increase the limit contained in the Athens Convention to 175,000 SDR in 1990 failed to gain support internationally, the U.K. government, following the *Herald of Free Enterprise* disaster, has increased the limit of 100,000 SDR for death or injury of passengers unilaterally to 300,000 SDR for carriers whose principal place of business is in the United Kingdom.[617] The limit for other carriers remains that specified in the Athens Convention, namely, 46,666

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ships in the same position as those on seagoing ships, because the Athens Convention does not apply to non-seagoing ships.

[613] It should be noted that the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 2004 corrects a small but important drafting defect as found in the 1998 Amending Order that enacts the 1996 protocol. This is done by omitting paragraph 2A from Part II of the 1998 Order, which provides "Paragraph 1(a) of article 2 shall have effect as if the reference to "loss of life or personal injury" did not include a reference to loss of life or personal injury to passengers of seagoing ships." That paragraph concerned the interpretation of Article 2 of the Convention, and its application to death or injury to passengers of seagoing ships. In certain circumstances that could arise in respect of personal injury/death claims in the event of a collision between a passenger vessel and a non-passenger-carrying ship, the defect could have the unintended consequence of depriving shipowners of the right to limitation. That would be contrary to the intention and spirit under the 1996 protocol of applying limitation for such claims. The amendment ensures that limitation of liability continues to apply for such claims on all seagoing ships, as originally intended, and avoids any conflict with the protocol.

[614] See Article 7(2) of the 1974 Athens Convention.

[615] See Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1987, S.I. 1987 No. 855.

[616] See Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) (Amendment) Order 1989 which came into force on 10th November 1989, S.I. 1989 No. 1880.

[617] See Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998, which came into force on 1st January 1999, S.I. 1998 No. 2917.

SDR.[618]

As stated previously, a protocol was adopted in 2002 by the IMO to replace the Athens convention with the main purpose of providing for a substantial increase of limits of liability for passenger injury/death claims. The 2002 Protocol also requires the carrier to maintain insurance cover with the passenger claimant having a right to take direct action against the insurer. Indeed, it might cause conflict for the U.K. to remain a party to the original Athens Convention 1974 which provides a quite inadequate limit for compensation nowadays, since it has exercised the option granted by Article 15(*3bis*) of the 1996 Limitation Protocol. Therefore, the U.K. government is currently considering the option for implementation of the 2002 Athens protocol.[619]

6.2.2 Under the Chinese Law

In China, the first legislation concerning shipowner's limitation of liability is the Provisional Measures on Handling Maritime Affairs promulgated by the Ministry of Transport in 1952.[620] According to the Measures, in respect of limits of liability for maritime claims, the maximum compensation of the shipowners shall be limited to the value of the vessel after the accident, passage money or freight and insurance amount of the vessel.[621]

In 1959, the Ministry of Transport amended the Measures and promulgated Certain Regulations on Compensation for Maritime Accidents.[622] The Regulations maintained the limitation regime based on the ship's value but removed the insurance proceeds of the vessel from the limitation fund. Therefore, the limitation fund was

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[618] As is well known, non-discrimination is one of the most important bases of the EC law. Non-discriminatory treatment of all EC products, nationals, and services, regardless of which country they are from and which country they are in, is essential to the Common market. The European Community's first legislative measure directed at liberalizing the provision of maritime services and prohibiting discrimination on the grounds of nationality was adopted in 1986 (Regulation 4055/86, OJ 1986 L378/1). A further legislative measure was adopted in 1992 (Regulation 3577/92, OJ 1992 L364/7) applying the principle of freedom to provide services to maritime cabotage, which had been excluded from the scope of the 1986 Regulations. The U.K. has jurisdiction to impose a higher limit on its own carriers. The legislation could not be considered contrary to the principle of non-discrimination solely because other Member States applied less strict provisions. Such disparities are acceptable as long as the problem has not been harmonized on the Community level. Therefore there was no incompatibility with the Community law. For the discussion of the freedom to provide maritime transport services in the Community, see generally, Malgorzata Nesterowicz, *Freedom to Provide Maritime Transport Services in European Community Law*, 34 J. Mar. L & Com. 629 (2003); Rosa Greaves, *The Provision of Maritime Transport Services in the European Community*, L.M.C.L.Q. 104 (2004).

[619] The U.K is the signatory to the 2002 Protocol.

[620] Before the foundation of the People's Republic of China in 1949, the first Maritime Code in China (adopted in 1929 and came into force on January 1, 1931) provided limitation of liability based on the ship's value.

[621] This was in line with the international practice at that time since the prevailing Convention on limitation of liability was the 1924 Convention that adopted mixed regime based both on tonnage and ship's value. In addition, China had limited economic power in the early days of foundation, and there were not much foreign trade and transport. So the provisions accorded with the situation of China at the time.

[622] The Regulations were promulgated by Ministry of Transportation on Sept. 19, 1959 and effective as of Oct. 15, 1959.

calculated on the basis of the post-casualty value of the vessel plus freight pending.[623] From then on, the 1959 Regulations have been generally applied by the courts as the primary legislation to determine the limitation of liability of shipowners until the Maritime Code which applies the tonnage system was enacted in 1992. For instance, in *The Zhedaiji 307*[624], where the accident occurred prior to the enactment of the Maritime Code, it was held by the Shanghai Maritime Court that the limitation fund was calculated on the basis of the ship's value and freight in accordance with the 1959 Regulations. It should be noted that claims for personal injury and death were not subject to limitation of liability under the Regulations.

The provisions on limitation of liability contained in the Maritime Code are largely borrowed from the 1976 Limitation Convention. And the limits of liabilities are the same as those in the 1976 Convention with small modifications, as will be shown below in detail. These provisions have completely changed the previous value-based system for calculating the limitation fund in China.

6.2.2.1 General Limits

6.2.2.1.1 International Transport

Article 210 of the Maritime Code provides for the calculation of general limits of liability for maritime claims (including personal claims and other claims). These limits are almost the same as Article 6 of the 1976 Convention, as can be found from the following tables. The tonnage for limitation purposes shall be the gross tonnage measured in accordance with the provisions of the 1969 International Convention on Tonnage Measurement of Ships.[625]

Following the 1976 Convention, the Maritime Code also adopts SDR defined by the International Monetary Fund as the unit of account in calculating the amount of the limitation fund. The SDR will be converted into Chinese currency (RMB) on the date of the court judgment or arbitration award or the date mutually agreed upon by the parties in accordance with the rules promulgated by the State Administration of Foreign Exchange.[626]

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[623] Article 4 of the Regulations provides: "The liability for damages resulting from marine accident is limited to an amount equal to the value of the vessel, freight, and compensation of damage sustained by the vessel since the beginning of voyage, and not repaired. The value of the vessel shall be estimated on the basis of the condition of the vessel at the time of her arrival at the first port after the accident; freight means the freight and/or passage money for the goods, luggage and passengers on board the vessel at the time the accident occurred."

[624] Shanghai Maritime Court [1993]. In 1988 the vessel *Zhedaiji 307* hit the pier and caused serious damage to the pier and consequential reconstruction of the pier.

[625] The Tonnage Measurement Convention applied to China with effect from July 18, 1982. For example, in *The Kaitone No.* 6, Guangzhou Mar. Court (Shi Zi) Civil Ruling No.74 (1997), it was held that the appropriate tonnage for calculating the limits of liability was the gross tonnage measured according to the 1969 Tonnage Measurement Convention, instead of the tonnage in the ship's registry which was measured according to the Thames Measurement Method.

[626] Article 277 of the China Maritime Code provides: The Unit of Account referred to in this Code is the Special Drawing Right as defined by the International Monetary Fund; the amount of the Chinese currency (RMB) in terms of the Special Drawing Right shall be that computed on the basis of the method of conversion established by the authorities in charge of foreign exchange control of this country on the date of the judgment by the court or the date of the award by the arbitration organization or the date mutually agreed upon by the parties.

Table 9

Limits for Personal Claims	
Tonnage of Vessel	Units of Account
300--500	333,000
	Each additional ton
501—3,000	500
3,001—30,000	333
30,001—70,000	250
In excess of 70,000	167

Table 10

Limits for Property Claims	
Tonnage of Vessel	Units of Account
300--500	167,000
	Each additional ton
501—30,000	167
30,001—70,000	125
In excess of 70,000	83

According to Article 210(3) of the Maritime Code, where the amount calculated in accordance with Table 9 is insufficient for payment of claims for personal injury/death in full, the amount calculated in accordance with Table 10 shall be available for payment of the unpaid balance of personal claims, and such unpaid balance shall rank ratably with property claims. This is virtually the same as Article 6(2) of the 1976 Convention. Therefore the provision encounters the same dilemma of interpretation, i.e., ambiguity of the wording will result in the difficulty to determine whether it is required to constitute funds for both personal claims and property claims even if there are no property claims. In addition, the Maritime Code expressly takes the option to grant priority to claims for damage to harbor works etc., as is allowed by Article 6(3) of the 1976 Convention.[627]

However, it is particularly notable that in China, conflict may arise as to the governing law in respect of limitation of liability for personal claims. Prior to the enactment of the Maritime Code, the Supreme Court had issued the Specific Rules on Adjudicating Compensation for Foreign-related Loss of Life or Personal Injury Claims at Sea (trial implementation) on November 8th, 1991 (effective as of July 1st, 1992). The Rules are the type of judicial interpretation given by the Supreme Court under the principles of the civil law.[628] In practice, the judicial interpretation issued by the Supreme Court plays a very important role in the interpretation of law and shall be binding and followed by the Chinese courts. As a result, the Rules have been relied upon by the maritime courts for adjudicating compensation arising from international personal claims. One of the important provisions in the Rules is Article 7 which provides that

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[627] According to Article 210(4) of the Maritime Code, without prejudice to the right of claims for loss of life or personal injury, claims in respect of damage to harbor works, basins and waterways and aids to navigation shall have priority over other claims.

[628] According to Article 32 of the Organic Law of The People's Courts of The People's Republic of China (originally promulgated on July 5th, 1979 and effective as from January 1st, 1980; amended several times in 1983, 1986, 2006 respectively; the latest amended version effective as from January 1st, 2007), the Supreme People's Court is empowered to give judicial interpretation on questions concerning specific application of laws and decrees.

the maximum compensation for personal claims at sea is RMB 800,000Yuan per person claiming. Since Article 210 of the Maritime Code has made explicit provisions on the limits of liability for personal claims, the maximum compensation of RMB 800,000Yuan established in Article 7 of the Rules is in direct conflict with the provisions of the Maritime Code. Therefore, it is necessary to decide which law shall govern the limits of liability for international personal claims.

The Law on Legislation of the People's Republic of China gives the scope of application of legislations of various levels.[629] Article 83 provides: For the laws, administrative regulations, local regulations, autonomous regulations, special rules, administrative rules or local rules enacted by the same body, if a special provision is different from a general provision, the special provision shall prevail; if a new provision differs from an old provision, the new provision shall prevail. Therefore, the Maritime Code, as the special law regulating the relations arising from maritime transport and those pertaining to ships,[630] prevails over other laws regulating the same, such as the General Principles of The Civil Law of The People's Republic of China.[631]

The Rules are apparently at a lower level than the Maritime Code. The maximum compensation established in Article 7 of the Rules has contravened the provision in respect of limits of liability for personal injury claims in Article 210 of the Maritime Code. Therefore, this provision should be regarded as repealed in judicial practice. Although some maritime courts have continued erroneously to apply the maximum compensation of the Rules, it is good to see that in *The Spring Trader*,[632] where a pilot was seriously injured when he was boarding the Panamanian vessel *Spring Trader,* both the Ningbo maritime court and the High Court of Zhejiang Province held that the compensation for the injury to the pilot was not confined by the maximum compensation of RMB 800,000Yuan in the Rules.

Similar to the provisions of the 1976 Convention, under the Maritime Code, the limitation fund shall be calculated on the basis of a notional tonnage of 1,500 for any salvor not operating from any ship or operating solely on the ship to, or in respect of which, he is rendering salvage services.[633] Similarly, the limits of liability are applicable to the claims arising from any distinct occasion.[634]

However, the general limits of liability as provided in the Maritime Code are not applicable to vessels less than 300 tons, vessels transporting between domestic ports, or vessels engaged in coastal operations. Article 210 of the Code provides that separate limits of liability shall be established by the Ministry of Transportation

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[629] This Law was promulgated on March 15, 2000 and effective as from July 1st, 2000.

[630] See Article 1 of the Maritime Code

[631] The General Principles of Civil Law was promulgated on December 4, 1986 and effective as from January 1st, 1987. China operates a civil law system with common law assimilations recently. The General Principles are the primary source of civil law in China.

[632] Ningbo Maritime Court [1999] No. 55; Provincial High Court of Zhejiang Province [2001] No. 96

[633] See Article 210(5) of the China Maritime Code.

[634] Article 212 of the Maritime Code provides that the limitation of liability shall apply to the aggregate of all claims that may arise on any given occasion against shipowers and salvors themselves, and any person for whose act, neglect or fault the shipowners and the salvors are responsible.

subject to the approval by the State Council.[635] Thus, the Regulations on the Limitation of Liability for Maritime Claims for Vessels With a Gross Tonnage not Exceeding 300 Tons and Vessels Engaging in Coastal Transport Services or Other Coastal Operations (Regulations on Vessels Below 300 tons and Vessels in Coastal Transport) were promulgated by the Ministry of Transport on November 15, 1993 and came into force on January 1, 1994.[636]

6.2.2.1.2 Vessels below 300 tons and Vessels in Coastal Transport

The Regulations provide different limits for vessels with a gross tonnage exceeding 20 tons and less than 300 tons, and those engaging in coastal transport services or other coastal operations.[637] The limitation of liability for ships below 300 tons is provided in Article 3 of the Regulations as illustrated in the following tables. For ships engaging in coastal transport or other coastal operations, the limitation of liability for ships below 300 tons shall be calculated on the basis of 50% of the limits provided in Article 3 of the Regulations; and for ships exceeding 300 tons, the limits shall be calculated on the basis of 50% of the limits provided in Article 210 of the Maritime Code.[638]

Table 11

Limits for Personal Claims

Tonnage of Vessel (Gross Tonnage)	Units of Account (SDR)
20--21	54,000
21--300	Each additional ton 1,000

Table 12

Limits for Property Claims

Tonnage of Vessel (Gross Tonnage)	Units of Account (SDR)
20--21	27,500
21--300	Each additional ton 500

As there exist two sets of limits in the Chinese maritime law, the question may arise as to what limits of liability shall apply when an accident occurs between vessels applying different limits. The pertinent provision of the Regulations provides: "Where the limits of liability for maritime claims provided by Article 210 of Maritime Code or Article 3 of the Regulations apply to one of the ships in an accident, they shall also

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[635] The pertinent provision of Article 210 provides: The limitation of liability for ships with a gross tonnage not exceeding 300 tons and those engaging in transport services between the ports of the People's Republic of China as well as those for other coastal operations shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council.

[636] Lower limits provided for coastal transport were presumably because the development of coastal transport had been left far behind the international transport due to the implementation of planned economy for coastal transport in the past. Besides, there were also considerations such as national protection policy and the practical domestic conditions involved. Lower limits for vessels below 300 tons are primarily for the purpose of protecting small ships.

[637] According to Article 3 of the Maritime Code, small ships of less than 20 tons gross tonnage are not included within the definition of "ship".

[638] See Article 4 of the Regulations

apply to the other ships in the same accident".[639]

The language of this provision is not clear. It seems the original intent of the drafters was that when vessels applying different limits are involved in the same accident, the higher limits shall be applied for both vessels. For instance, in *The Jinhang,*[640] the limits provided in the Regulations should have been applicable to the tanker involved in the collision as she engaged in coastal transport. However, since the shipowner of *Jinhang* also applied for limitation of liability, and the Maritime Code is applicable to *Jinhang* which was engaged in international transport, the court held that the higher limits provided by the Maritime Code should equally apply to both vessels in accordance with Article 5 of the Regulations. As a result, the limits for the tankers were calculated by reference to the provisions of the Maritime Code which are double of those provided in the Regulations.[641]

However, this provision has caused much dispute. The ambiguity of the wording has resulted in confusion in the construction and application of the appropriate law. As a matter of fact, if the higher limits as provided in the Maritime Code apply equally to the ships involved which should have applied different limits, it will incur unreasonable consequences. That is, there are no appropriate limits for vessels below 300 tons since the minimum tonnage provided in the Maritime Code for calculating the limitation fund is 300 tons. Therefore, it is suggested that this provision should be amended; different limits of liability should apply to different vessels involved in accordance with either the Code or the Regulations respectively. This is also in line with the legislative intent for drafting the Regulations to give preferential treatment to vessels of small tonnage or engaged in coastal transport.

Another issue particular to China is to determine the nature of the transport between ports of the mainland of China and Hong Kong and Macao as Hong Kong and Macao returned back to China on July 1st 1997 and December 20th 1999 respectively. To be specific, it is to determine whether such transport is international or coastal transport, so as to calculate the limits of liability in accordance with the provisions of either the Maritime Code or the Regulations. From the perspective of sovereignty, Hong Kong and Macao are special administrative zones of China. Obviously, transport between the mainland of China and Hong Kong and Macao is domestic transport. However, meanwhile in practice, to facilitate economic and trade development, as well as to maintain the laws and practices before the coming back of these special administrative regions,[642] transport between ports of the mainland of China, Hong Kong and Macao is virtually considered international transport. Therefore, the limits as provided in the Maritime Code are applicable to vessels transporting between the mainland of China

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[639] See Article 5 of the Regulations.

[640] Xiamen Maritime Court [2002]. On March 30, 2002, the vessel *Jinhang*, on her voyage from Japan to Fuzhou, collided with a tanker which engaged in coastal transport. *Jinhang* sank together with the cargo on board. Both vessel owners applied to the court for limitation of liability.

[641] According to Article 4 of the Regulations, limits for ships exceeding 300 tons and engaged in coastal transport shall be 50% of the limits of liability provided for in Article 210 of Maritime Code.

[642] This stems from the Basic Law of The Hong Kong Special Administrative Region of The People's Republic of China and the Basic Law of the Macao Special Administrative Region of the People's Republic of China. The Basic Law concerning Hong Kong was promulgated on April 4, 1990 and effective as of July 1st, 1997. The Basic Law concerning Macao was promulgated on March 31, 1993 and effective as of December 20, 1999. One of the principles in the Basic Law is to maintain the previous social system and legal regime unchanged for 50 years.

and Hong Kong and Macao.

The case law has generally confirmed this point. For instance, in *The Minhai No.231*,[643] the court held that the Regulations on Vessels Below 300 tons and Vessels in Coastal Transport did not apply to the vessel *Minhai No.231* as she was engaged in transport between Hong Kong and Macao, and her tonnage was over 300 tons. Therefore the limits of liability for *Minhai No.231* shall be calculated in accordance with Article 210 of the Maritime Code. Similarly, in *The Foshan No.8*,[644] it was held that since the vessel *Foshan No.8* was engaged in transport between ports of the mainland of China, Hong Kong and Macao, the limitation fund should be calculated according to the Maritime Code instead of the Regulations.

6.2.2.2 Limits for Passenger Claims

Similar to Article 7 of the 1976 Convention, Article 211 of the Maritime Code also introduces a completely separate limitation fund for passenger's personal injury or death claims, which is calculated by multiplying 46,666 SDR by the number of passengers which the ship is certificated to carry, but subject to a maximum amount of 25,000,000 SDR.

With respect to the limitation of liability of the carrier for passenger claims per carriage by sea, the Maritime Code has adopted the relevant provisions of the 1974 Athens Convention.[645] Article 117 of the Maritime Code provides a limit of 46,666 SDR per passenger for passenger's death or injury per carriage, which is the same figure as provided in Article 211 of the Maritime Code.

It should be noted that the above limits of liability as provided in the Maritime Code are not applicable to passengers' claims arising from domestic lines of transportation by sea. According to the Code, separate limits of liability shall be established for such claims by the Ministry of Transport subject to the approval of the State Council.[646] Thus, the Regulations on the Limitation of Liability for Carriage of Passengers by Sea between the Ports of the People's Republic of China (Regulations on Coastal Passenger Transport) were promulgated by the Ministry of Transport on November 15,

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[643] [1996] Guangzhou Maritime Court. The vessel *Minhai No.231* owned by Xiamen Shipping Company collided with the vessel *Chongqing* owned by Shishi Company in the waters near Guangdong Province, causing serious damage to the latter vessel. Xiamen Shipping Company applied for limitation of its liability to Guangzhou Maritime Court.

[644] [2003] Shenzhen Division of Guangzhou Maritime Court. The vessel *Foshan No.8* with a tonnage of 940 tons owned by Foshan Foreign Trade and Transport Co. (Foshan company) collided with the vessel *Anshunda* operated by Beihai Shipping Co. (Beihai company) in the waters of Shenzhen. *Anshunda* and the cargo on board sank into the sea. The Foshan Company applied for limitation of its liability in accordance with the Regulations, which was challenged by the Beihai Company.

[645] The 1974 Athens Convention and its 1976 Protocol apply to China with effect from August 30, 1994.

[646] Paragraph 2 of Article 211 provides that the limitation of liability for claims for loss of life or personal injury to passengers carried by sea between the ports of the People's Republic of China shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council.

Paragraph 4 of Article 117 provides that the limitation of liability of the carrier with respect to the carriage of passengers by sea between the ports of the People's Republic of China shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council.

1993 and came into force on January 1, 1994.

The Regulations were drafted in consideration of the capacity of domestic shipping enterprises and the relevant provisions for other domestic transportations means such as road and rail transport. The Regulations have greatly increased the limits of liability compared with the previous relevant provisions such as those in the 1951 Regulations on Compulsory Insurance for Injury to Passengers on Board Vessel.[647] However, the limits are still much lower than those established in Article 117 and Article 211 of the Maritime Code.

According to Article 3 of the Regulations on Coastal Passenger Transport, the limitation of liability of the carrier *per* carriage of passengers by sea shall be calculated as follows:[648]

Table 13

Limits for Passenger Claims *per* Carriage (1 SDR≈RMB 11.53Yuan[649])	
Personal injury/death to the passenger	RMB 40,000Yuan/passenger
Loss of or damage to the passengers' cabin luggage	RMB 800Yuan/passenger
Loss of or damage to the passengers' vehicles (including the luggage carried therein)	RMB 3,200Yuan/vehicle
Loss of or damage to other luggage	RMB 20Yuan/kilo

The total limitation of liability in respect of claims for personal injury or death to passengers carried by sea shall be RMB 40,000Yuan multiplied by the number of passengers which the ship is certificated to carry, but not exceeding the maximum amount of RMB 21,000,000Yuan.[650]

6.2.2.3 Limitation of Liability for Vessels Used for Inland Navigation

According to Article 15(2)(a) of the 1976 Convention, a State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are, according to the law of that State, ships intended for navigation on inland waterways. Many countries have enacted legislations to limit liability of shipowners of such vessels used for inland navigation to protect inland waterway shipping.[651]

However, in China, the situation is quite different. Ships used for inland navigation and transport are excluded from the scope of ship as defined by Article 3 of the Maritime Code.[652] As is known, China is basically a civil law country. Maritime law in China is regarded as a special branch of the civil law. The principles of the civil law

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[647] The Regulations were promulgated on April 24, 1951 and effective as from June 24, 1951.

[648] A higher limit of liability may be agreed upon between the carrier and the passenger in writing.

[649] For the daily exchange rate between SDR and RMB, please visit http://www.imf.org

[650] See Article 4 of the Regulations.

[651] For instance, the U.K. and the U.S. limitation laws provide that imitation of liability applies to all the vessels, whether sea-going or not.

[652] Article 3 of the Code provides that "ship" means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage.

will apply if the special law does not contain any relevant provisions. Thus, inland navigation shall be regulated by the General Rules on Civil Law of China instead of the Maritime Code.[653] The civil law provides compensation of actual loss; therefore, there is no limitation of liability for vessels used for inland navigation.

Indeed, depriving owners of vessels used for inland navigation of the limitation privilege departs from the original intent of the limitation regime to protect and encourage development of shipping industry. The differential treatment against vessels used for inland navigation is unfair to the owners of such vessels since they have to bear the risks arising from shipping whether the vessels navigate on the sea or on inland waterways.

As a matter of fact, the early legislation on limitation of liability for maritime claims in China, i.e., the 1959 Certain Regulations on Compensation for Maritime Accidents, did not make a distinction between sea-going ships and ships used for inland navigation. Therefore all ships, whether sea-going or not, were virtually within the protection of limitation of liability under the 1959 Regulations.

Suppose limitation of liability applies to the vessels used for inland navigation, limits of liability should be accordingly established by reference to the tonnage of the vessel. The limits may be lower than those in the Maritime Code, probably equal to those in the Regulations on Vessels Below 300 tons and Vessels in Coastal Transport so as to avoid multi-level limits of liability. The different treatment between sea-going vessels and vessels used for inland navigation is just the level of the limitation fund. Therefore, provisions in the Maritime Code on persons entitled to limit, claims subject to and excluded from limitation, and loss of the right to limit are still applicable in determining the limitation issue in respect of such vessels used for inland navigation.

Certainly, Article 3 of the Maritime Code should be accordingly amended to include vessels used for inland navigation within the scope of vessels under the Code. Furthermore, it seems necessary to include vessels below 20 tons within limitation of liability, since such vessels play an important role in inland navigation and transport and thereby are exposed to the same shipping risks. Therefore, such vessels of small tonnage should also be included within the scope of vessels when the Maritime Code is amended.

Indeed, the two Regulations (on Vessels Below 300 tons and Vessels in Coastal Transport, and on Coastal Passenger Transport) promulgated by the Ministry of Transport only govern the special limits of liability for vessels below 300 tons or engaged in coastal transport of cargo and passengers. As to the other aspect of the limitation of liability, such as persons entitled to limit, claims subject to and excluded from limitation, the standard for debarring limitation, the provisions of the Maritime code still apply. Probably it is the right time to incorporate the limits of the Regulations into the Maritime Code.

Furthermore, experience of implementation of the Maritime Code and the two Regulations has indicated that the limits of liability provided in the Regulations on Coastal Passengers Transport are apparently too low to satisfy the passenger's claims.

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[653] Article 2 of the Maritime Code provides: "Maritime transport as referred to in this Code means the carriage of goods and passengers by sea, including the sea-river and river-sea direct transport."

Therefore, considering the overwhelming tendency to increase the limits of liability to a greater extent as shown by the 2002 Protocol to the Athens Convention and the 1996 Protocol to the 1976 Limitation Convention, for the purpose of protecting the interests of passengers, it is suggested that the limits for coastal passenger claims should be increased when the Maritime Code is to be amended. Probably, the limits of liability could be provided as 50% of the limits provided in the Maritime Code. This is also consistent with the provisions of Article 4 of the Regulations on Vessels Below 300 tons and Vessels in Coastal Transport which fix the limits for coastal transport or operations at 50% of those provided by the Maritime Code or the Regulations.

6.2.3 Under the U.S. Law

As previously indicated, the U.S. limitation regime is based on the ship's value. Section 183(a) of the Limitation Act provides that absent privity or knowledge the liability of a shipowner "shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Therefore, a shipowner is entitled to limit his liability for all limitable claims to his interest in the vessel and the vessel's pending freight.

It has long been settled that the value of the shipowner's interest in the vessel should be the post-casualty value of the vessel. In this respect, two early decisions of the U.S. Supreme Court arising from the collision of the *City of Norwich* played a crucial role in the evolution of the U.S. limitation law.[654] The Court in *Norwich I*, after reviewing the history of limitation of liability statutes, particularly the English and French versions, held that the value of the vessel was to be taken after the collision. This was contrary to the pre-accident rule under the English law. The Court in *Norwich II* further explained this to mean that the value was to be taken at the end of the voyage giving rise to the claims against which limitation was sought, which in this case was when the *City of Norwich* sank after proceeding thirty to forty miles back to port after the collision. Thus, the decision also implied that the amount of the limitation fund for those limitable claims was determined on a "per voyage" basis.[655] The rules established in *The City of Norwich* have shaped the formulation of the U.S. limitation law on the limitation fund.[656]

The 1851 Limitation Act remains largely unchanged since its enactment except substantial change was made in the 1936 amendment. This amendment, aroused by the *Morro Castle* disaster and other maritime casualties which indicated severe insufficiency of the limitation fund, provided a minimum limitation fund of $60 per ton and other benefits for personal injury/death claimants in the case of sea-going vessels. This supplemental limitation fund was increased to $420 per ton in the 1984 Amendment.

Needless to say, the method of calculating the limitation fund is the worst feature of the U.S limitation regime. If the vessel suffers great disaster, the limitation fund

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[654] *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871) (*Norwich I*); *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1886) (*Norwich II*).

[655] The companion cases were *Dyer v. National Steam Nav. Co.* (*The Scotland*), 118 U.S. 507 (1886) and *Thompson v. Whitehall* (*The Great Western*), 118 U.S. 520 (1886).

[656] Donald C. Greenman, *Limitation Of Liability: A Critical Analysis Of United States Law In An International Setting*, 57 Tul. L. Rev. 1139, 1174-1178 (1983)

would be extremely inadequate or even zero (if the vessel is lost) except in cases involving personal injury/death claims where the supplemental fund has been established. As a result, the U.S. judiciary has demonstrated an open hostility towards the limitation regime. The courts have formulated various methods or doctrines to increase the limitation fund or circumvent the application of the limitation privilege.[657] One of the notable examples has been elaborated in the previous chapter, that is, the courts are prone to establish "privity or knowledge" on the shipowners to deny their right to limitation when limitation would produce an apparent inequity.

Hereinafter we will discuss in more detail the elements that constitute the limitation fund, i.e., interest in the vessel and pending freight, as well as the supplemental fund.

6.2.3.1 Value of the Vessel

Under the U.S. law, the amount of the limitation fund is calculated on the basis of value of the vessel and her pending freight at the conclusion of the voyage upon which the casualty occurs.[658]

6.2.3.1.1 Determination of the Ship's Value

It has been established by the Supreme Court that the value of the vessel for limitation purposes is intended to mean "fair market value" by reference to "contemporaneous sales of like property in the way of ordinary business."[659] In other words, proof of market value is usually established either by a recent sale of the actual vessel, or other recent sales of comparable vessels with any adjustments necessary to reflect the age and condition of the particular vessel being valued.[660] If market value cannot be ascertained due to a lack of sufficient sales of similar vessels or extraordinary market conditions,[661] the court may resort to alternative methods to determine the vessel's value, including reproduction cost less depreciation, purchase price, and valuations by reputable surveyors for insurance and other purposes.[662]

In determining the limitation fund, all of the vessel's gear, fuel oil, deck and engine stores, spare parts, and even equipment temporarily installed on board are included in

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[657] See generally, John Biezup and Timothy Abeel, *The Limitation Fund and Its Distribution*, 53 Tul. L. Rev. 1185 (1979)

[658] See e.g. *Place v. Norwich & New York Transp. Co.*, 118 U.S. 468 (1886); *The Scotland*, 105 U.S. 24 (1882); *In re Alva S.S. Co.*, 262 F. Supp. 328 (S.D.N.Y. 1966); *In re Cuba Distilling Co.*, 1947 AMC 27 (S.D.N.Y. 1946).

[659] See *Standard Oil Co. v. Southern Pac. Co.*, 268 U.S. 146, 155, 1925 AMC 779, 782 (1925).

[660] See *The I.C. White,* 295 F. 593 (4th Cir. 1924).

[661] In *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396 (1949), it was observed there must be a sufficient quantity of sales of similar property before a court can find that the sales indicate a "market value." Otherwise, there is "no market" for the vessel and the court may have to rely upon other methods to determine the market value. See also *Barton v. Borit*, 316 F.2d 550, 553 (3d Cir. 1963), where the court suggested that sales must be "numerous enough to afford reliable evidence on the value of such vessels." However, forced sales prices are not considered as good indicators of market value. See e.g. *Oliver J. Olson & Co. v. S.S. Marine Leopard*, 356 F.2d 728 (9th Cir. 1966); *Dynafuel-Fernview*, 1968 AMC 1996 (S.D.N.Y. 1968).

[662] See, e.g., *Dynafuel-Fernview*, 1968 AMC 1996 (S.D.N.Y. 1968); *Webb v. Davis*, 137 F. Supp. 557 (E.D.N.C.), aff'd, 236 F.2d 90 (4th Cir. 1956). See Shane Carew, *Vessel Valuation: Problems And A Proposal*, 5 Tul. Mar. L.J. 59, 65 (1980)

the ship's value. For instance, in the *Main v. Williams*,[663] the United States Supreme Court, reviewing the rationale behind the U.S. limitation of liability, determined that all ancillary equipment constituting part of the maritime adventure was properly included in a limitation fund. In doing so, the Court stated: "The real object of the Act in question was to limit the liability of vessel owners to their interest in the adventure; hence, in assessing the value of the ship, the custom has been to include all that belongs to the ship, and may be presumed to be the property of the owner, not merely the hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances, comprising whatever is on board for the object of the voyage, belonging to the owners, whether such object be warfare, the conveyance of passengers, goods, or fisheries. It does not, however, include the cargo, which, presumptively at least, does not belong to the owner of the ship."[664]

Thus, in *The Haynie*,[665] the owner of a fishing vessel intended to limit his liability in respect of a fisherman's death to the value of the smaller purse boat carried aboard her. The court stated the purse boat was a part of the equipment of the main boat as any other part, such as her anchors, chains or ropes, davits. Therefore, the larger fishing boat together with all the equipments on board should be included in the limitation fund. Similarly, in *In re Motor Lifeboat No. 5*[666] which involved claims for personal injuries of seamen, the *Motor Lifeboat No. 5* was considered as a unit of the mother ship in bringing their seamen to their respective vessels and thereby should be surrendered in the calculation of the limitation fund.

The vessel is valued as if she were a free vessel on the open market without reference to any benefit that might accrue under her existing contractual obligations. Thus, a charter party, remunerative or otherwise, is not considered as increasing the value of the vessel.[667] If the vessel has been destroyed before the voyage is concluded, it is possible that the limitation fund may be just the wreck's salvage value, or in the case of an unsalvageable sunk vessel, equal to the pending freight only. On the other hand, if the vessel is repaired at a port of refuge and thereafter completes her voyage, her value for limitation purposes would seem to be her repaired value, thereby increasing her limitation fund.[668]

6.2.3.1.2 Other Interests for Limitation Purposes

It is to be noted that the interests in the vessel are not confined to tangibles on board. The typical one is, where there are claims against third parties for damage to the vessel during the voyage (for example, the amount of any recovery by the vessel for its own collision damages). Such claims are a part of the shipowner's interest in the vessel and may be included in the limitation fund.[669] However, this does not extend to

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[663] 152 U.S. 122 (1894)

[664] 152 U.S. 122, 131 (1894)

[665] 1931 AMC 381 (E.D. Va. 1930)

[666] 57 F. Supp. 624, 1944 AMC 1110 (S.D.N.Y. 1944).

[667] See *In re Pacific Bulk Carriers, Inc.*, 1975 AMC 1145 (S.D.N.Y.).

[668] See, e.g., *In re Pacific Bulk Carriers, Inc.*, 1975 AMC 1145 (S.D.N.Y.); *The Lara*, 1947 AMC. 27 (S.D.N.Y. 1946)

[669] See, e.g., *O'Brien v. Miller*, 168 U.S. 287 (1897); *Phillips v. Clyde S.S. Co.*, 17 F.2d 250 (4th Cir. 1927); *In re A.C. Dodge, Inc.*, 173 F. Supp. 906 (E.D.N.Y. 1959), aff'd, 282 F.2d 86 (2d Cir. 1960); *Oliver J. Olson & Co. v. American S.S. Marine Leopard*, 356 F.2d 728 (9th Cir. 1966).

the shipowner's claims for indemnity from a third-party tortfeasor.[670] These indemnity claims are considered as compensation from a collateral source and therefore are treated like insurance.[671] For example, in *Julianae Shipping Corp. v. Amalgamet*,[672] the fund was calculated based upon the market value of the vessel at the end of the voyage, less the cost of repairs and related expenses. The court also added to this amount the value of the freight due, plus any future recovery by the shipowner for physical damage to the vessel and demurrage.

Another important issue relating to the interest in the vessel is whether insurance proceeds are such interest in the vessel under the U.S. limitation law so as to be included in the limitation fund for distribution to the claimants. This question was raised and answered by the Court in *The City of Norwich*.[673] The Court concluded that insurance proceeds were not an interest in the vessel, but merely the benefits of a collateral contract, and thereby excluded from the limitation fund to allow a shipowner to repair or replace his ship.[674] Indeed, excluding insurance proceeds from the limitation fund is consistent with the post-casualty rule under the U.S. limitation law. If shipowners were required to contribute his insurance proceeds to the limitation fund, the system based on the post-casualty value of the vessel would become meaningless.[675] Furthermore, it would probably discourage owners from insuring their vessels, and also defeat the principal object of the limitation system. Since the decision in *The City of Norwich*, the shipowner's right to retain the proceeds of his hull insurance has remained intact.[676]

6.2.3.1.3 Pending Freight

According to the Limitation Act, the pending freight is another important element to be included in the limitation fund. The U.S. jurisprudence has indicated that "pending freight" should be given a broad interpretation in favor of the injured parties. For example, in *The Main v. Williams*,[677] the Supreme Court held that freight included all rewards, hire, or compensation paid to or owed to the shipowner for the carriage of the cargo, or other service performed by the vessel during the entire voyage on which the casualty occurred.

"Pending freight" has been construed to mean the amount of gross freight actually

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[670] See, e.g., *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 1966 AMC 2685 (5th Cir. 1966)

[671] See E. D. Vickery, *Special Problems of Personal Injury and Death Arising Out of Collision Disaster Cases*, 51 Tul. L. Rev. 896, 917 (1977)

[672] 1987 AMC 2663 (D.Conn.)

[673] 118 U.S. 468 (1886). Two other companion cases, *The Scotland*, 118 U.S. 507 (1886) and *The Great Western,* 118 U.S. 520 (1886), raised the identical question for determining whether hull insurance should be surrendered into the limitation fund. Therefore, the three cases were decided together by the Supreme Court.

[674] The court stated: The insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. *Id.* at 494.

[675] As the court in the *City of Norwich* observed, to require the shipowner to surrender his insurance proceeds "would virtually and in effect bring back the law to the English rule, by which the owner is made liable for the value of the ship before collision – the very thing which, in all our decisions on the subject, we had held it was the intention of Congress to avoid by adopting the maritime rule". *Id.* at 505.

[676] See, e.g., *Pettus v. Jones & Laughlin Steel Corp.*, 322 F. Supp. 1078 (W.D. Pa. 1971); *In re Pacific Navig. Co.*, 263 F. Supp. 915 (D. Hawaii 1967)

[677] 152 U.S. 122 (1894)

earned during the voyage in question.[678] In general, freight is not considered earned until the goods or passengers are carried to and delivered at the place of destination.[679] Even if the vessel is lost, any prepaid or guaranteed freight is included in the limitation fund since such freight has been actually earned on the voyage. "Freight" must be related to a particular voyage. Thus, in *La Bourgogne*,[680] it was held that annual mail subsidy payments for the carriage of mail by sea could not be treated as freight earned for the voyage on which the vessel was lost.[681]

Generally speaking, calculation of freight is a simple matter in traditional voyages involving the carriage of cargo. However, it may become more difficult when the vessel involved in the casualty is a drill barge, dredge, or other construction vessel operating under some sort of contract. Given that limitation should be construed broadly in favor of the injured party, courts will probably include the entire contract value for the work being performed at the time of the casualty as the vessel's pending freight.[682] For instance, in *In re North American Trailing Company*,[683] the court decided that the proceeds of a dredging contract, for which the vessel was the main instrument of performance at the time of the casualty, should be included as the pending freight.

6.2.3.1.4 Voyage Rule

Since under the U.S. limitation law, the owner's interest in the vessel is determined at the end of the voyage, a voyage is a limitation unit even if more than one accident occur. Under this voyage rule, which is in contrast to the distinct occasion rule as adopted in the tonnage system, the limitation fund is constituted for all the claims arising from one particular voyage instead of one distinct occasion. Therefore, the issue of what constitutes the voyage determines what constitutes the limitation fund, i.e., calculation of the value of the vessel and the pending freight.

For limitation purposes, a voyage is generally considered as terminated when the vessel reaches her destination,[684] or the voyage is abandoned by the owner, or a disaster occurs causing actual or practical destruction of the vessel.[685] Thus, where more than one casualty occurs during the particular voyage, none of which results in termination or abandonment, the owner is entitled to limit against the multiple occurrences with one fund calculated on the basis of the ship's value as determined at the end of the entire voyage. In the case of a casualty resulting in termination or abandonment of the voyage, it is the value as determined immediately after the

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[678] See, e.g., *The Main v. Williams*, 152 U.S. 122 (1894); *In re Hedger Co.*, 59 F.2d 982 (2d Cir. 1932)

[679] See, e.g., *La Bourgogne*, 139 F. 433 (2d Cir. 1905), aff'd, 210 U.S. 95 (1908); *Pacific Coast Co. v. Reynolds*, 114 F. 877 (9th Cir.), cert. denied, 187 U.S. 640 (1902).

[680] 139 F. 433 (2d Cir. 1905), aff'd, 210 U.S. 95 (1908)

[681] Certainly, this will lead to the question of how to define a "voyage", as will be discussed in the next subsection.

[682] See Jill Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Tul. Mar. L.J. 659 (2000)

[683] 763 F.Supp. 152 (E.D.Va. 1991)

[684] See *In re Moore*, 278 F. Supp. 260 (E.D. Mich. 1968); *The Pelotas*, 21 F.2d 236 (E.D. La. 1927).

[685] It is more difficult to determine the duration of the voyage of a special purpose vessel such as an offshore drilling rig. It may be argued that each well drilled constitutes a voyage, or even perhaps, that a separate voyage begins each time a new crew comes on board.

casualty that caused abandonment of the voyage or destruction of the vessel.[686] For example, in *The Great Western*,[687] the vessel, after colliding with a bark, continued her voyage to her destination but was subsequently stranded and wrecked due to the negligence of her master. The court held that the collision that the ship was previously involved in did not automatically terminate the voyage for limitation purposes. The voyage was not terminated until the vessel was sunk and stranded. Therefore the owner could limit his liability to the wreck value.

The voyage is not terminated if the vessel called at intermediate ports either for temporary repairs or for discharging cargo. The entire trip may still be considered as a single voyage. In *In re Caribbean Sea Transport,*[688] for example, the court held that the vessel's trip from one port to another was merely a leg of one voyage.[689] If the casualty occurred on a round trip voyage, only freight on a particular voyage should be considered pending and surrendered to the limitation fund for that voyage. For example, in *The Black Eagle,*[690] the court held that the money earned under the contract for carriage of mail from New York to European ports between the owner and the Postmaster General was earned on the eastbound voyage. Therefore, it was not properly a part of the "freight" to be included in the limitation fund that arose because of a collision on the westbound voyage from Rotterdam to New York. Similarly, in *The La Bourgagne*,[691] the court considered each trip between Le Havre and New York which the vessel sailed regularly back and forth a distinct and separate voyage. Thus, only the freight earned during the eastbound voyage on which the vessel was damaged was included in the limitation fund.

Nevertheless, the rule that a voyage consists of a one-way trip is not without dispute. In *The William J. Riddle*,[692] the ship carried a cargo of animals to foreign ports and returned to the United States in ballast. The freight rate was calculated on the assumption that the return trip would be without cargo. The court found the round trip was considered as a single voyage and required the shipowner to surrender the freight for the round trip, even though the collision occurred on the return trip after delivery of cargo at destination. The court distinguished *The Black Eagle* and *The La Bourgogne* by observing that the respective east and westbound trips of the vessels in those cases were not connected in purpose with the preceding trip in the other direction; while here the return trip was merely the necessary method of returning the vessel to the United States. Therefore, it seems what constitutes a voyage depends largely on how the facts of each particular case are viewed by the courts concerned.

As a matter of fact, even if the vessel is not engaged in a voyage, limitation still could be invoked if a certain event, accident, or disaster gives rise to various losses. In other words, the claims are grouped "by the event" as the limitation unit when the ship is

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[686] See, e.g., *The City of Norwich*, 118 U.S. 468 (1886); *In re Moore*, 278 F. Supp. 260 (E.D. Mich. 1968); *The Alpena*, 8 F. 280 (N.D. Ill. 1881)

[687] 118 U.S. 520 (1886)

[688] 748 F.2d 622 (1984)

[689] See also, *The Sam Simeon*, 63 F.2d 798 (2d Cir.), cert. denied, 290 U.S. 643 (1933), where it was held that all the freight earned relating to the entire trip should be surrendered into the limitation fund, although the vessel had called at an intermediate port for discharging part of cargo on board.

[690] 87 F.2d 891 (2d Cir. 1937)

[691] 210 U.S. 95 (1908)

[692] 111 F.Supp. 657 (S.D.N.Y. 1953)

not on a voyage.[693]

6.2.3.2 Supplemental Fund

The potential unfairness created by the limitation regime based on the ship's value had long been recognized. Especially when the particular voyage destroys the vessel, only the salvage value or pending freight is left to constitute the limitation fund. In particular, aroused by the public indignation towards the *Morro Castle* disaster,[694] the U.S. Congress made the first major amendment to the Limitation Act in 1935, establishing a supplemental fund of $60 per ton only available in respect of personal injury or death claims when seagoing vessels are involved. Subsequent amendments in 1984 increased the original $ 60 per ton requirement to the current amount of $ 420 per ton.[695]

Therefore, under the U.S. limitation law, two limitation funds may be established as the circumstances require—the traditional one under section 183(a) for the value of the vessel and pending freight to be distributed between all claimants, and the supplemental one only for the personal injury/death claimants, based on the $ 420 per ton requirement under section 183(b). This tonnage-based limitation fund was created to insure that a minimum amount would be available for personal injury/death claims in the event that the vessel's basic limitation fund provided by section 183(a) did not meet this minimum requirement.[696] If the supplemental fund is still insufficient to pay personal injury/death claims in full, the claims are paid in proportion to their respective amounts.

It should be noted that the $420 supplemental fund only applies to seagoing vessels as defined by section 183(f) of the Limitation Act. Vessels such as barges and pleasure boats are exempted from the requirement, and may thereby limit liability to the value of the vessel and pending freight at the conclusion of the voyage. In addition, the supplemental limitation fund is established on the basis of a distinct occasion in

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[693] See *Republic of France v. United States (Texas City Disaster),* 290 F.2d 395 (5th Cir. 1961). Although limitation was denied, the court assumed that the Limitation Act applied to the single event of the fire and explosion that occurred on board the vessel while it was loading cargo. See also, e.g., *In re Great Lakes Transit Corp.,* 53 F.2d 1022 (N.D. Ohio 1931); *Lehigh Valley R.R. v. Jones,* 50 F.2d 828 (3d Cir. 1931); *The Panuco,* 47 F. Supp. 249 (S.D.N.Y. 1942). See Rae Crowe, *Kinds of Losses Subject to Limitation: The "Personal Contract" Doctrine*, 53 Tul. L. Rev. 1087 (1979).

[694] See *Morro Castle* (Settlement), 1939 AMC 895 (S.D.N.Y. 1939), where 134 lives were lost during the disaster which occurred in 1934.

[695] 46 U.S.C 183(b) provides: In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $ 420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $ 420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

Further efforts were made to modify the American limitation scheme as a result of the *Yarmouth Castle* disaster, 266 F. Supp. 517 (S.D. Fla. 1967), where the cruise ship *Yarmouth Castle* caught fire and sank with the loss of 88 passengers. This resulted in the passage of the Financial Responsibility Act of 1966 (46 U.S.C. 817) which requires all cruise ship owners whose vessels embark passengers at United States ports to demonstrate proof of their financial ability to satisfy personal injury and death claims.

[696] E. D. Vickery, *Special Problems of Personal Injury and Death Arising Out of Collision Disaster Cases*, 51 Tul. L. Rev. 896, 918-924 (1977)

contrast with the voyage rule in the case of the basic limitation fund.[697] Computation of the tonnage for purposes of the supplemental fund shall be based on the vessel's gross tonnage which is calculated according to section 183(c) of the Limitation Act.[698]

6.2.3.2.1 Seagoing Vessels

As indicated above, only the owners of a "seagoing vessel" may be required to pay the supplemental limitation fund in order to satisfy personal injury/death claims. The term "seagoing vessel" is not easy to define. Section 183(f) of the Limitation Act defines the term in a negative way for purposes of the supplemental fund. The term "seagoing vessel" does not include "pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title."[699]

The purpose of the laundry list contained in section 183(f) was to protect the interests of owners of harbor or inland-type vessels from the supplemental fund.[700] Therefore the laundry list of non-seagoing vessels was properly construed, with the exception of pleasure yachts, as limited to harbor and river vessels. For example, in *In re Panama Transport Co.*,[701] the first case that arose under the section 183(f), the court concluded that the vessel concerned could not qualify for the section 183(f) exclusion since the intent of Congress by section 183(f) was to refer to tank vessels which are of the harbor or river type. Accordingly, the supplemental fund applied. In the same vein, in *In re A.C. Dodge, Inc.*,[702] it was found that the *Dodge* was not the "harbor or river" type of tank vessel excluded from the provision of section 183(f), but was a seagoing vessel. Although she had operated for extended periods in inland waters, she was nevertheless capable of operating coastwise, was so licensed, and had made several voyages involving ocean travel. Therefore, the shipowners were required to supply the supplemental personal injury fund.

6.2.3.2.2 Distinct Occasion

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[697] 46 U.S.C. 183(d) provides that the owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

[698] 46 U.S.C. 183(c) provides that the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

[699] Section 188 of the Act states that owner's limitation of liability applies to "all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."

[700] The exclusions in section 183(f) have been applied to such vessels as motorboats, e.g., *In re Hocking*, 158 F. Supp. 620 (D.N.J. 1958), *In re Rowley*, 425 F. Supp. 116 (D. Idaho 1977); fishing vessels, e.g., *In re Bogan*, 103 F. Supp. 755 (D.N.J. 1952); barges, e.g., *Pettus v. Jones & Laughlin Steel Corp.*, 322 F. Supp. 1078 (W.D. Pa. 1971); and tugs, e.g., *Admiral Towing Co. v. Woolen*, 290 F.2d 641 (9th Cir. 1961).

[701] 73 F. Supp. 716 (S.D.N.Y. 1947).

[702] *In re A.C. Dodge, Inc.*, 173 F. Supp. 906 (E.D.N.Y. 1959), aff'd, 282 F.2d 86, 1961 AMC 233 (2d Cir. 1960). See also, e.g., *In re Pan Oceanic Tankers Corp.*, 332 F. Supp. 313 (S.D.N.Y. 1971); *In re Talbott Big Foot, Inc.*, 854 F.2d 758, 1989 AMC 1004 (5th Cir. 1988).

The 1936 Supplemental Fund Amendments have established the distinct occasion rule when personal injury or death claims are involved. This is an exception to the voyage rule that requires grouping different claims arising from a single voyage.[703]

Obviously, the Congress intended that each set of personal injury/death claimants whose claims arise on separate and distinct occasions on the particular voyage have a separate supplemental fund. Concerning the interrelations of the two limitation funds under the limitation statute, all sets of claimants from two or more separate and distinct accidents during the particular voyage should share the single section 183(a) traditional fund proportionally; and to the extent that the fund is insufficient, separate section 183(b) supplemental fund should be made available for each set of personal injury/death claimants from the two or more distinct accidents.

As to the meaning of "distinct occasion" under section 183(d), it is presumed that the U.S. court would adopt the same interpretation as developed by the U.K. courts to determine whether different incidents constitute distinct occasions within the meaning of the limitation statute. Certainly, each case must turn on its own particular facts. In *In re Alva S.S. Co.*,[704] the issue was whether the collision which resulted in substantial loss of life and the explosion which occurred more than a month after the original collision and caused further loss of life and damage to the ship when in the hands of the salvor were considered as two distinct occasions within the meaning of Section 183(d), so that two separate supplemental funds needed to be constituted. Although the court declined to decide the issue due to a lack of evidential hearing of related facts, nevertheless it did provide some guidelines on how to apply the distinct occasion rule by citing an English case *The Lucullite*[705]:

...In *The Lucullite*, which involved two collisions, the court found two distinct occasions, holding that there were distinct acts of negligence causing damage to two different ships, and that the sinking of the ship was not an inevitable consequence of the collision with the first ship. It has been stated that if successive collisions occur as a result of the same negligent act, all constitute one "distinct occasion", but if there is time and opportunity after the first collision to take action which would avoid the second collision, each is a "distinct occasion".[706]

Thus, in *Exxon Shipping Co. v. Cailleteau,*[707] it was held by the court that the latter collision and the earlier explosion were two distinct and separate occasions for limitation purposes. The appropriate rule was the "distinct occasion" rule which had been developed in the U.K. and in the U.S.. Based on the negligence principles, it was determined that the shipowners could not cumulate a series of distinct occurrences into one liability for purposes of establishing the supplemental fund.

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[703] See 46 U.S.C. 183(d)

[704] 262 F. Supp. 328 (S.D.N.Y. 1966)

[705] (1929) 33 Ll.L.Rep. 186

[706] 262 F. Supp. 328, 330 (S.D.N.Y. 1966). Since the court did not decide the "distinct occasion" issue, it would have been more equitable to make the supplemental fund available for personal injury/death claims arising from both the collision and the explosion.

[707] See Lloyd's Maritime Law Newsletter 0251 [1989]. Exxon's barge No. 334 exploded and sank, causing injuries and deaths. Immediately after the explosion, Exxon had the wreckage marked to warn other mariners of its location. However, later a barge collided with the wreckage. Exxon received claims from the barge owner and subsequently also claims arising from the explosion of Barge 334.

6.2.3.3 Flotilla Doctrine

Another important factor needs to be considered in calculating the limitation fund, that is, the number of the shipowner's vessels engaged in the venture during which the casualty occurred. It may not be difficult to determine the value of a vessel when only a single vessel is involved. However, when multiple vessels are involved in a common venture, the situation could become very complicated. For that purpose, the U.S. courts have developed the unique “flotilla doctrine” to determine the shipowner’s limitation fund in respect of multiple vessel situations.[708]

The key to the so-called "flotilla doctrine" is the legal relationship between the shipowner and the claimant in a particular case. If the damage was incurred by a "pure tort," that is, no privity of contract exists between the shipowner and the claimant, only the value of the actual "offending" vessel needs be included in the limitation fund.[709] In contrast, if the damage resulted from performing a contract between the shipowner and claimant, all of the shipowner’s vessels used to carry out the contract in a common venture will make up the "flotilla" whose aggregate value will constitute the limitation fund.[710] Therefore, different results may arise depending on how the relationships between the shipowner and the claimant were viewed by the courts.[711]

6.2.3.3.1 Evolution of the Flotilla Doctrine

The evolution of the “flotilla doctrine” could be traced back to an early American case, *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal.*[712] In that case, a car float in the tow of a tug was involved in a collision. The car float was held as a passive instrument in the hands of the steam tug which was actively responsible for the collision. Based on the language of the Limitation Act, the court held that no matter whether the vessels involved in the venture were under common ownership or not, only the tug actively at fault must be surrendered to the limitation fund.

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[708] See generally, George E. Duncan, *Limitation of Shipowners' Liability: Parties Entitled to Limit; the Vessel; the Fund*, 53 Tul. L. Rev. 1046, 1065-76 (1979).

[709] See, e.g., *Liverpool, Brazil and River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, (1919); *In re United States Dredging Corp.*, 264 F.2d 339 (2d Cir.), cert. denied, 360 U.S. 932 (1959); *Deep Sea Tankers v. The Long Branch*, 258 F.2d 757 (2d Cir. 1958); *In re American Commercial Lines*, 353 F. Supp. 872 (E.D. Ky. 1973); *South Carolina Highway Dep't v. Jacksonville Shipyards*, Inc., 1976 A.M.C. 456 (S.D. Ga.); *In re Waterman S.S.*, 794 F. Supp. 603, 1992 AMC 2661. In most cases, the tug, the motive power and dominant mind, is the vessel actively responsible for the casualty, although under some circumstances the tow has been held to be the offending vessel.

[710] See, e.g., *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927), 1927 AMC 397; *Southern Transp. Co. v. Knickerbocker Fuel Co.*, 79 F.2d 1011 (4th Cir. 1935); *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir. 1967); *In re Drill Barge No. 2*, 454 F.2d 408 (5th Cir. 1972); *Wirth Ltd. v. S/S. Acadia Forest,* 537 F.2d 1272, 1976 AMC 2178 (5th Cir. 1976); *In re North American. Trailing Co.*, 763 F. Supp. 152, 1993 AMC 2108 (E.D. Va. 1991); *United States Dredging Corp. v. Krohmer,* 264 F.2d 339, 1959 AMC 1110 (2d Cir. 1959); *In re Western Transp. Co.*, 194 F. Supp. 834 (D. Ore. 1961); *In re Allied Oil Co.*, 59 F. Supp. 71 (N.D. Ohio 1944); *Cleveland Tankers, Inc. v. Szwed,* 154 F.2d 605 (6th Cir. 1946); *Murray v. New York Cent. R.R.*, 287 F.2d 152 (2d Cir.), cert. denied, 366 U.S. 945 (1961); *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548 (2d Cir. 1933), cert. denied, 290 U.S. 704 (1934).

[711] See, Jill A. Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Mar. Law. 659 (2000)

[712] 251 U.S. 48 (1919)

Therefore, according to the principle established in *Liverpool*, a shipowner may only be required to surrender such vessels as are found at fault to the limitation fund. The U.S. courts followed this principle in a number of subsequent cases. For instance, in *Deep Sea Tankers v. The Long Branch*,[713] it was found that the car floats and sand scows in tow of the two tugs were merely passive instruments of navigation without motive power of their own. Therefore, only the two actively responsible tugs need be included in the limitation fund. Similarly, in *South Carolina State Highway Department v. Jack-sonville Shipyards, Inc.*,[714] the court held that only the value of the moving tug must be surrendered in respect of damages caused by the barge in tow striking the bridge due to the negligence of the master of the tug. In *In re Midland Enterprises, Inc.*,[715] it was held that the limitation fund included both the value of the tug and the offending barges that sank, damaging the dam.[716]

However, the clarity established by *Liverpool* was confused by the U.S. court's decision in *Sacramento Navigation Co. v. Salz*,[717] which brought forth the troublesome flotilla doctrine.

In *Sacramento Navigation Co. v. Salz*, the court held that in a case involving the collision of a towed barge with an anchored ship, the tug and tow together constituted one "vessel transporting merchandise" in a cargo claim against the carrier under the terms of the Harter Act,[718] because only by acting in concert were they "the effective instrumentality" that performed the contract of affreightment. The *Salz* Court distinguished *Liverpool* as involving "pure tort" rather than a contractual obligation. Different questions arise under different situations. In a pure tort situation, the question is what constitutes the "offending vessel". In contrast, in a contractual relationship, the question is what constitutes the vessel by which the contract of transportation is to be effected. If the contractual obligation is to be fulfilled by the entire flotilla of vessels, the value of the entire flotilla should be surrendered for purposes of calculating the limitation fund.

Ever since the decision of *Sacramento Navigation Co. v. Salz,* the dichotomy of "pure tort" and "contractual relationship" has been employed in the analysis and application of the flotilla doctrine. The courts have come to distinguish between a "pure tort" situation where the claimant has no previous relationship with the shipowner causing the damage and the "contractual obligation" situation where the claimant is engaged in a contractual relationship with the shipowner causing the damage. In the "pure tort" situation, only the offending vessel must be surrendered in limitation. Whereas in the "contractual obligation" situation, the flotilla doctrine requires that all vessels engaged in the performance of the venture must be surrendered. The U.S. courts have expanded the flotilla doctrine to a variety of situations involving contractual relationships, including not only contracts of transportation, but also contracts of

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[713] 258 F.2d 757 (2d Cir. 1958)

[714] 1976 AMC 456 (S.D. Ga. 1975)

[715] 296 F. Supp. 1356, 1970 AMC 2437 (S.D. Ohio 1968).

[716] See also, e.g., *In re Lake Tankers Corp.*, 132 F.Supp.504 (S.D.N.Y.1955), modified, 323 F.2d 573 (2d Cir. 1956); *In re Texaco Marine*, 1992 AMC 776 (D. Del. 1990); *CSX Transportation v. Tug Captain Jake,* 1991 AMC 2875 (E.D. La. 1991); *Steuart Inv. Co. v. Bauer Dredging Constr. Co.*, 323 F. Supp. 907, 1971 AMC 1447 (D. Md. 1971).

[717] 273 U.S. 326, 1927 AMC 397 (1927)

[718] 46 U.S.C. 192

employment, and contracts of offshore oil rig constructions, dredging and other maritime projects etc.

Perhaps the most influential case indicating such expansive application was *Standard Dredging Co. v. Kristiansen*,[719] where a seaman was injured on a barge due to its unseaworthy condition of an uncovered and unlighted hatch. In deciding whether to include the dredge and the barge in the limitation fund, the court found *Salz*, not *Liverpool*, to be controlling. The court, presumably in the name of social justice, held that to limit liability for breaches of duties incidental to a contract, all vessels engaged in the dredging operation must be surrendered despite the fact that the seaman was injured on the barge, not the dredge, and the two vessels were unconnected at the time of the accident. Thus, by virtue of the employment contract between the injured seaman and the shipowner, the entire flotilla should be surrendered into the limitation fund. Whether vessels of the entire flotilla are physically attached to each other is not a factor to take into account for the purpose of taking the flotilla as one vessel engaged in a common venture.[720]

The *Kristiansen* decision has become the keystone for invoking the flotilla doctrine. Ever since then, many courts that are hostile to the limitation regime require that the entire flotilla be surrendered where there is any indication of a contractual relationship existing between the shipowner and claimant.

For example, in *In re Tom Quinn Co.*,[721] which involved a personal injury claim that arose during the use of a barge and its attendant tug in bridge repair operations, the court required both vessels to be included in a limitation fund, noting the contractual employer-employee relationship sufficient to invoke the flotilla doctrine. In *Brown & Root Marine Operators, Inc. v. Zapata Offshore Co.*,[722] the court applied the flotilla doctrine to a contract of offshore oil rig construction work. The court held that the entire flotilla should be surrendered since there was a contractual obligation of the shipowner to perform the work, although none of the vessels were connected at the time of the casualty. Similarly, in *In re Drill Barge No. 2*, [723] an explosion aboard one of the barges caused serious personal injuries to some employees. Various equipment and vessels were used in the operation. By applying the flotilla doctrine to the construction contract, the court held that the shipowner's entire flotilla in the common operation must be surrendered into the limitation fund.[724]

6.2.3.3.2 Viability of the Flotilla Doctrine

Although the flotilla doctrine has been recognized and followed by the U.S. courts, it has been under constant criticism from commentators and scholars. Probably the main reason for the survival of the doctrine to date is that it has never been reversed by the

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[719] 67 F.2d 548 (2d Cir. 1933), cert. denied, 290 U.S. 704 (1934), 1933 AMC 1621.

[720] George Duncan, *Limitation of Shipowners' Liability: Parties Entitled to Limit; the Vessel; the Fund*, 53 Tul. L. Rev. 1046, 1069 (1979)

[721] 806 F. Supp. 945, 1993 AMC 2112 (M.D. Fla. 1992)

[722] 377 F.2d 724, 1967 AMC 2684 (5th Cir. 1967)

[723] 454 F.2d 408, 1972 AMC 1008 (5th Cir. 1972).

[724] See also, e.g., *In re Cross State Towing Co.*, 1992 AMC 1423 (M.D. Fla. 1991); *In re United States Dredging Corp.*, 264 F.2d 339, 1959 AMC 1110 (2d Cir. 1959).

Supreme Court who created it, nor legislatively overruled.[725] Indeed, the "flotilla doctrine" has proven difficult to apply in multiple-vessel cases, since sometimes it is hard to determine whether there exists any contractual relationship between the parties involved.

The rationality of the pure tort-contractual relationship dichotomy involving the flotilla doctrine has been frequently questioned. As a matter of fact, there seems to be no logical connection between whether there is a contractual relationship between the shipowner and the claimant and the question whether the shipowner should surrender merely the actively responsible vessel or the entire flotilla into the limitation fund. The doctrine has not received universal acceptance. For instance, in *In re Norfolk Dredging Co.*,[726] a crewman on the derrick suffered personal injury. The dispute was whether the value of shipowner's interest in his entire fleet and equipment used in the performance of the dredging operation should be included in the limitation fund. The court refused to apply the traditional "flotilla doctrine" developed from *Salz* and *Kristiansen* and found that only the value of the derrick and the two accompanying pusher tugs needed to be included in the limitation fund. This decision not to include the entire flotilla of vessels involved in the operation represents a significant departure from the "flotilla doctrine".

According to the court, the flotilla doctrine derived from an erroneous application of a Harter Act decision in *Salz* to a limitation action by the *Kristiansen* court. As a result, it led to the highly misleading distinction between "pure tort " situations and "contractual relationship" situations. The result reached in the *Kristiansen* decision, deviating far from the *Salz* case, could not have been anticipated by the Supreme Court in light of its own understanding of the *Liverpool* case.

The sole issue before the *Salz* court was the statutory construction of the phrase "any vessel transporting merchandise," under section 3 of the Harter Act that provides which carriers may be exempted from liability for any cargo damage incurred during the voyage. Taking the tug and the barge together as one "vessel transporting merchandise" will reduce the shipowner's liability exposure and thus protect the shipowners. In contrast, under section 183(a) of the Limitation Act, the shipowner's liability, absent his own privity or knowledge, is limited to the interest of such owner in such vessel. Including all vessels to the limitation fund is to expose the vessel owner to potentially greater liability. The significant difference has shown that the Harter Act cannot be relied upon in determining which vessels should be included in the limitation fund.[727]

To sum up, the fact that a vessel is simply used in the performance of a contract with

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[725] See *Deep Sea Tankers, Ltd. v. Long Branch,* 258 F.2d 757, 773, 1959 AMC 28, 54 (2d Cir. 1958) ("We are not at liberty to disregard this binding precedent simply because a contrary view may seem to reach a conclusion more in keeping with the realities of this particular case."); *In re Allied Towing Corp.,* 1978 AMC 2484, 2493 (E.D. Va. 1978) ("The distinction between *Liverpool* and *Salz* has rightly been criticized by the lower federal courts and the commentators for many years. There seems to be little reason for such a distinction; ... Nonetheless, these cases were decided by the Supreme Court, and we are bound to follow them.").

[726] *In re Norfolk Dredging Co.*, 279 F. Supp. 2d 674, 2003 AMC 403 (E.D.N.C. 2003).

[727] See Joseph Lee & Stuart Sperling, *The Eleventh Amendment, the Flotilla Doctrine, and Other Flanking Maneuvers: Recent Efforts by Claimants to Avoid the Application of the Limitation of Shipowners' Liability Act*, 29 Tul. Mar. L.J. 1, 17-27 (2004)

the claimant is not sufficient to include it in the limitation fund. Whether a shipowner must surrender the value of additional vessels to his limitation fund is not dependent on the dichotomy between contractual and pure tort situations, but instead on whether the particular vessel contributed to the loss by act or omission. Thus, the principle established in *Liverpool* makes clear sense and should remain the Supreme Court authority for determining the limitation fund in the context of the Limitation Act.[728]

Perhaps, it is the right time to consider reversing the decision in *Kristiansen* by the Supreme Court or amending the Limitation Act to eliminate the "flotilla doctrine". Otherwise, the struggle with the tort-versus-contract dichotomy will persist.

Conclusion

The regime for calculating the limitation fund has gradually evolved from the value-based system to the tonnage system. On the international plane, both the 1957 and the 1976/1996 Limitation Conventions which are in general use have adopted the tonnage system in relation to limitation of liability.

Under both Conventions, separate limitation funds are established for personal injury/death claims and property claims respectively based on tonnage, where personal injury/death claims are given preferential treatment. However, the general limits of liability contained in the 1976 Convention are significantly higher than those under the 1957 Convention. Besides, the 1976 Convention has introduced a completely new provision for calculating the limits of liability for salvors in response to the *Tojo Maru* accident. A completely separate limitation fund is also established in respect of passenger death/injury claims, by which the limitation fund is ascertained by the number of passengers that the ship is certificated to carry, but subject to a maximum cap.

The 1976 Convention is amended by the 1996 Protocol primarily for the purpose of increasing the limits of liability substantially for all tonnages of vessels so as to satisfy the claims nowadays. The 1996 Protocol also brings forward some other significant amendments, such as increasing the limits for passenger claims and removing from the 1976 Convention the cap. This Protocol has achieved wide appeal; however, some defects still remain.

In respect of domestic legislations, the U.K. legislations have always kept pace with the development of those Conventions. Currently, the 1996 Protocol to the 1976 Limitation Convention is effective in the U.K. Therefore, the limits of liability under the U.K. limitation law are the same as provided by the 1996 Protocol except some slight changes by virtue of exercise of the right of reservation. The U.K. limitation law maintains the 300-ton minimum tonnage when it adopted the 1996 Protocol despite the 1996 Protocol has increased the minimum tonnage from 500 tons to 2,000 tons. With regard to passenger limits, there is no overall limit for passenger injury/death claims arising from incidents involving ships whether seagoing or not. As

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[728] Some author proposed adoption of a common-ownership test to eliminate the much criticized "flotilla doctrine" so as to obtain certainty in this complicated area. However, it seems that contribution to the loss or the damage should be taken as the only reasonable criteria. See Charles Lugenbuhl & David Sharpe, *The Law of Towage at the Millennium: What Changes Are Needed?* 73 Tul. L. Rev. 1811, 1821 (1999)

a result, those passenger claims will only be subject to the per capita limits. Furthermore, the U.K. law has increased the limits for those passenger claims for their own carriers. The U.K. government is currently considering to implement the 2002 Protocol to the Athens Convention for a more realistic and adequate compensation limit for passenger claims.

As far as the Chinese legislation is concerned, since the provisions on limitation of liability contained in the 1992 China Maritime Code were drafted largely by reference to the 1976 Limitation Convention, provisions concerning the limits of liability including the general limits, limits for salvors and limits for passenger claims are the same as those in the 1976 Convention with small modifications. It should be noted that China restricts the application of the limits of liability as provided in the Maritime Code for vessels below 300 tons and vessels engaged in coastal transport of cargo or passengers. Accordingly, the Ministry of Transport promulgated two Regulations to establish separate limits of liability for those vessels. In shipping practice, transport between ports of the mainland of China, Hong Kong and Macao is virtually taken as international transport. Therefore, the limits as provided in the Maritime Code shall apply.

There are some apparent deficiencies existing in the provisions for calculating the limitation fund. Given that the Maritime Code is to be amended, it is submitted that the limits as provided in the Regulations should be incorporated into the Maritime Code to simplify the law, and the limits of liability provided in the Regulations on Coastal Passenger Transport should be increased to satisfy the passengers' claims sufficiently. Moreover, vessels used for inland navigation should be included within the scope of vessels as defined by the Code so as to enjoy the protection of limitation of liability.

With regard to the U.S. legislation, the U.S. limitation regime is traditionally based on the ship's value. A shipowner is entitled to limit his liability for all limitable claims to his interest in the vessel and the vessel's pending freight. Insurance proceeds are not taken as interest in the vessel under the U.S. limitation law. The 1851 Limitation Act remains much in its historical form since its enactment except substantial change was made in the 1936 Amendment which provided a supplemental limitation fund for personal injury/death claims in the case of sea-going vessels. Furthermore, the U.S. courts have developed the unique "flotilla doctrine" to determine the shipowner's limitation fund in a multiple vessel situation. The flotilla doctrine requires that the entire flotilla be surrendered where there is any indication of a contractual relationship existing between the shipowner and claimant. This doctrine has been under constant criticism ever since its existence. Indeed, the governing criterion for purposes of calculating the limitation fund under multiple vessel circumstances should be whether the particular vessel contributed to the loss or damage.

Nowadays, many maritime countries have adopted the tonnage system of either the 1957 Convention or 1976/1996 Convention. The tonnage system appears to be fairer and more favorable to the claimants since the limitation fund is guaranteed. Needless to say, the method for calculating the limitation fund based on the ship's value is often regarded as the worst feature of the U.S limitation regime. As a result, the U.S. judiciary has demonstrated an open hostility towards the limitation regime and thereby taken *de facto* efforts to repeal the statute. The courts have formulated various methods or doctrines either to increase the limitation fund, e.g. adopting the flotilla doctrine, or circumvent the application of the limitation privilege, e.g., establishing privity or knowledge on the shipowners to deny their right to limitation. It is hoped that the U.S. Congress will revitalize its limitation legislation by reference to the 1976/1996 Limitation Convention which will greatly increase and guarantee the limitation fund and expressly eliminate the flotilla doctrine.

Part II

Limitation of Liability for Maritime Claims —Procedural Aspects

Chapter Seven   Procedures for Limitation of Liability

Introduction

In the previous Chapters the substantive aspects of limitation of liability for maritime claims have been extensively examined and analyzed. However, the right to limit liability does not arise automatically, and it is necessary for the person liable who wishes to limit his liability to invoke the limitation proceedings. The limitation is granted only if the court is satisfied, by virtue of such proceedings, that the incident in respect of which limitation is sought arose without any misconduct on the part of the person liable to be deprived of this privilege.

Obviously, there are no uniform rules of procedure for limitation of liability. The Limitation Conventions leave the procedural aspects of limitation cases mostly to be governed by the national law. Generally speaking, different jurisdictions adopt domestic procedural rules specifically applicable to limitation cases, although limitation proceedings generally share many features of any other civil actions. The different rules of procedure may significantly affect the substantive rules and thus adversely affect uniformity of limitation law.

This Chapter will discuss the procedural issues arising from limitation of liability under the international limitation conventions and the domestic legislations, i.e., the U.K. law, China law and the U.S. law, such as what court can determine the limitation issues, how to invoke the limitation proceedings, how the limitation fund is to be constituted and distributed, bar to other actions, what notice to claimants need be given, and the like. These factors may be important in a particular case since the procedural provisions are equally crucial to obtaining the benefits of limitation.

Firstly, it is necessary to examine the procedural rules contained in the Limitation Conventions as well as their implementation in practice.

7.1 Under the Conventions

Although both the 1957 and 1976 Limitation Convention provide for procedural matters to some effect, limitation proceedings are largely left to be regulated by the national law of a particular State Party. By express reservation and by implication much is left to the individual state parties to arrange on a domestic basis. For example, both Article 4 of the 1957 Convention and Article 14 of the 1976 Convention contain the similar provision that the rules relating to the constitution and distribution of the limitation fund and all rules of procedure in connexion therewith shall (except stated otherwise in the Conventions) be governed by the national law of the State Party in which the fund is constituted.[729]

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[729] See Article 4 of the 1957 Convention and Article 14 of the 1976 Convention. Articles 10-14 of the 1976 Convention deal with the practical aspects of limitation.

7.1.1 To invoke the Limitation of Liability

Generally, it is well recognized that limitation of liability can be invoked in one of two ways: by way of an independent limitation action for a decree of limitation, or as a defence in response to the liability action.

7.1.1.1 Commencing the Limitation Action

The first method of invoking the limitation is to commence a limitation action, which action, if successful, entitles the person liable to limit his liability against all persons whoever claiming or being entitled to claim in respect of damage or loss resulting from the particular incident. Such an action is designed to marshal the claims against a shipowner and to distribute the limitation fund between the claimants. Accordingly, where more than one party has a right to claim damages from the shipowner, it is suggested for the shipowner to commence a limitation action for a decree of limitation which is good against the world.

In *The Happy Fellow*,[730] it was held that a limitation action was a special proceeding to which all potential claimants were made parties and included a power to stay proceedings to enforce any judgments which might be obtained in other actions; in a multi-party situation the shipowners' right to limit was to have all claims scaled down to their proportionate share of a limited fund.

The right to limit is a quite separate issue from the issue of liability. It is the shipowner who has the right to apply to limit.[731] As such, a limitation action may take place in a different forum from that in which liability is being litigated.[732] As observed by David Steel J in *The Denise*,[733] there is nothing in the 1976 Convention "to limit the entitlement of the [limitation] claimant to invoke the jurisdiction of the court to seek decree of limitation even in circumstances where there is no claim (as yet) brought against him in this jurisdiction. To the contrary, it seems to me that the Convention expressly contemplates it. Of course it will be a rare case where a claimant invokes the jurisdiction of a state party to seek a decree of limitation of liability in circumstances in which there is no realistic prospect of any claim being brought in that jurisdiction to justify the constitution of the fund merely to invoke thereby the sort of powers that are afforded under the English rules of court…".

Therefore, in the event the limitation action and the liability action are brought in the same court, it is to be noted that the two actions are incompatible for consolidation because there were involved different issues, a conflicting burden of proof and different standards of conduct at issue. It is further noted that the limitation action should border on a summary procedure, whereas the liability action would probably proved to be complex litigation. Consolidation would save little cost and could result

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[730] See *Happy Fellow* (1997) 1 Lloyd's Rep 130, (1998) 1 Lloyd's Rep 13

[731] See *Bouygues Offshore, S.A. v. Caspian Shipping Co. (Nos.1, 3, 4 and 5)*, [1998] 2 Lloyd's Rep. 461, 474

[732] See *Caspian etc. v. Bouygues Offshore S.A. (No. 4)*, [1997] 2 Lloyd's Rep. 507, 525

[733] 3 December 2004, unreported (quoted from *Analysis and Comment: The Western Regent*, 11 Journal of International Maritime Law 263, 264 (2005))

in extra expense.[734]

7.1.1.2 By Other Proceedings

A shipowner's right to limit his liability may be raised in other proceedings. It may be raised by way of a defence in response to a liability action.[735] The disadvantage of asserting limitation in this way is that if the court holds that the shipowner is entitled to limit his liability, that determination will only bind the parties to the particular proceedings. It will not protect the shipowner from claims by other persons and there would be no power to stay actions brought by other claimants. The judgment does not concentrate all claims against that same person arising from that same incident into one jurisdiction. This basically means that if damages which would ordinarily be assessed in fact exceed limit of liability, judgment will be given only for the limit.[736] Thus, if some other claimants bring another action in respect of loss or damage against him arising out of the same occurrence, the person liable might be found liable to pay the limitation amount over again, assuming that the loss or damage was in excess of the limitation amount and he could again prove his right to limit in the further action.[737] If limitation is invoked in this manner it has never been necessary for any limitation fund to be constituted before judgment.[738]

It is apparent that a limitation action is not only concerned with determining a shipowner's right to limit, but also concerned with marshalling the claims against the shipowner, determining those claims and distributing the limitation fund ratably between the claimants. If limitation arises in other proceedings, the court is concerned only with determining the amount of the damages for which the shipowner is liable to the claimant.

If there is only one claim, the shipowner ought to plead limitation of liability as a defence, because the issue of limitation and all other issues can be decided in proceedings between the claimant and the shipowner. A limitation action is unnecessary and thus undesirable in a single claim situation since there are no claims to marshal and no need to distribute a limitation fund in court ratably between different claimants.[739]. In *The Mekhanik Evgrafov,*[740] it was held that where only one cargo claim is brought, it was not appropriate for the shipowners to commence subsequent limitation proceedings in the event that the cargo owners were successful

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[734] See *Canadian Pacific Railway Company v. The Sheena M,* [2000] 4 F.C. 159 (Can. F.C., *per* Hargrave, P.), where the liability action would be stayed in favour of its own limitation action brought in the same court.

[735] See, e.g., *The Falstria* [1988] 1 Lloyd's Rep. 495; *The Volvox Hollandia* [1988] 2 Lloyd's Rep. 361.

[736] See *Beauchamp v. Turrell* [1952] 2 O.B. 207; *Wheeler v. London & Rochester Trading Co. Ltd.* [1957] 1 Lloyd's Rep. 69. When assessing damages generally, a court is not influenced by the likelihood that the defendant shipowner may succeed in his application to limit liability.

[737] In *The Waltraud,* [1991] 1 Lloyd's Rep. 389, where Sheen J. observed that it would be sensible for the defendants to commence a limitation action rather than plead limitation by way of defence in two separate actions by various cargo claimants where the total damages might well exceed the 1976 limitation fund.

[738] Christopher Hill, *Maritime Law,* London: L.L.P., 5th ed., 1998, p. 407-412.

[739] See *Happy Fellow* (1997) 1 Lloyd's Rep 130, (1998) 1 Lloyd's Rep 13 and *The Penelope II* (1980) 2 Lloyd's Rep 17.

[740] [1988] 1 Lloyd's Rep. 330, where cargo interests brought a claim for damage to a cargo of newsprint.

in their action (it was an abuse of the process of the court since the judgment had been given *res judicata*). The proper way for the shipowners who wish to limit liability is to plead limitation by way of defense in the liability action or seek a declaration as to their right to limit their liability.[741]

7.1.1.3 When to Admit the Liability?

It should be noted that Article 1(7) of the 1976 Convention has made it clear that the act of invoking limitation of liability shall not constitute an admission of liability.

However, jurisprudence seems to have indicated the inconsistency with the issue as to when liability has to be admitted. In *Caspian Basin v. Bouygues (No.* 4),[742] it was held by Mr. Justice Rix that admission or determination of liability should not be taken as a prerequisite to the commencement of a limitation action or the granting of a decree in that action, especially under the 1976 Convention, the test for breaking limitation was extremely difficult to meet. The words in Article 1(7) of the 1976 Convention were a pointer that the Court had the discretion to determine the owner's right to limit even when liability is still in issue. However, in *Caltex v. BP*,[743] Mr. Justice Clarke doubted whether a shipowner could in practice obtain a decree of limitation without admitting liability in an amount greater than the limit. That implies an admission of liability is a prerequisite to the granting of a decree if not to the commencement of a limitation action.[744]

Common sense dictates that if for no other reason, liability must at some stage, i.e. before limitation could be granted, be admitted since the grant will eventually be that liability is limited and not that the likelihood of liability is limited. The mechanism in the 1976 Convention for protecting shipowners entitled to limit their liability applies only after both liability is established and a limitation decree granted.[745]

7.1.1.4 To Invoke Limitation without Constitution of Limitation Fund

Limitation actions may be initiated with or without limitation funds being constituted. Article 10(1) of the 1976 Convention provides that limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted, unless a State Party provides otherwise by its national law.[746]

For example, in *The Western Regent*,[747] it was held that the constitution of a

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[741] See also *The Falstria* (1988) 1 Lloyd's Rep 495.

[742] [1997] 2 Lloyd's Rep. 507

[743] [1996] 1 Lloyd's Rep. 286, 299

[744] See also, comment by Mr. Justice Longmore in *The Happy Fellow*, [1997] 1 Lloyd's Rep. 130, 133 to the effect that the English limitation action assumes that there is a liability, even though that liability is not, and may never be, admitted; all questions of primary liability will be determined in the French proceedings.

[745] Christopher Hill, *Maritime Law*, London: L.L.P., 5th ed., 1998, p. 407-412.

[746] See Article 10(1) of the 1976 Convention; furthermore, Article 10(2) provides that the terms of Article 12 which deals with distribution of the fund are to apply even if limitation of liability is invoked without the constitution of a fund.

[747] [2005] 2 Lloyd's Rep. 54. The seismic survey vessel *Western Regent* collided with a marker buoy which was dragged from its position causing damage to a wellhead installation in a North Sea oilfield. The owners and demise charterers of the *Western Regent* commenced limitation proceedings in the

limitation fund or the ability to constitute a limitation fund under Article 11(1) of the 1976 Convention was neither a pre-condition of the jurisdiction to hear and determine a limitation claim nor of the power given to the court in an appropriate case to grant a limitation decree. There was nothing in the wording of the Convention which suggested that the entitlement to limit only arose where the limitation claimant could constitute a limitation fund within the meaning of Article 11(1). On the contrary, Article 10 was granting a free-standing entitlement to limit irrespective of whether there was ever a fund constituted. That was clear from Article 10(2), which contemplated expressly that the process of limitation right down to the payment of claims might take place without the constitution of a limitation fund.

Thus, under the 1976 Convention it is not necessary for a shipowner seeking to limit his liability to constitute a limitation fund. However, a shipowner may decide to do so at an early stage after invoking limitation, primarily based on two considerations. Firstly, the various rights contained in Article 13 of the 1976 Convention intended to protect the assets of the person invoking limitation apply only after a limitation fund has been constituted. That is, once the limitation fund has been constituted, the shipowner may prevent claimants from pursuing their claims against his other assets in other jurisdictions.[748] In addition, any ship or other property or security which has been arrested or attached within the jurisdiction of a state party may be released and in some cases must be released, as is determined by the court's discretion according to the circumstances of the case.[749] Secondly, by constituting a fund, the shipowner can avoid subsequent adverse depreciation of the appropriate national currency against SDR.[750][751] Otherwise, he may find himself ultimately paying more than he would have been obliged to pay at any earlier date. The shipowner takes the risk of currency fluctuations before the fund is constituted. Certainly, the risk also exists that the conversion rate may go down between the date of constituting the fund and the date of decree by the court, then the shipowner may well regret having constituted the fund too early; but at least the shipowner achieves certainty.[752].

As a result, the person liable needs to reach an informed decision as to whether he should constitute the limitation fund at an early stage and thereby protect himself against subsequent increases in the fund and obtain the benefit of the rights afforded by Article 13 or wait until later the claims have been proved.

The 1957 Convention contains no explicit provision as to how and where the fund was to be constituted. This was left to the domestic law of each country. In contrast, the 1976 Convention provides in Articles 11 and 12 detailed guidelines for the constitution and distribution of the fund and it is only where these provisions are not

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English Admiralty Court claiming to limit their liability. Two months later the claimant filed a complaint in the U.S. against the shipowners claiming damages.

[748] See Article 13(1) of the 1976 Convention

[749] See Article 13(2) of the 1976 Convention.

[750] It always depends on the particular facts of each case in determining the appropriate currency into which the limit should be converted, e.g. in *The Mosconici*, [2001] 2 Lloyd's Rep 313, it was held that, based on various considerations, including the business involvement, customary practices between the parties, terms and conditions of the contract, the currency which most justly expressed the loss that had been sustained by the claimants was U.S. dollars, but not Italian liras.

[751] Under Article 8(1) of the 1976 Convention the value of the SDR is fixed at the date the limitation fund shall have been constituted, payment is made or security is given.

[752] Simon Gault, *Limitation Procedure And Forum Shopping,* Conference of Limitation of Liability 1998, Institute of Maritime Law, Univ. of Southampton.

specific to the particular situations that reference is to be made to the national law of the State Party where the fund is constituted.

7.1.2 Constitution of Limitation Fund

Under 1976 Convention, it is established by Article 11(1) that a fund may be constituted by any person alleged to be liable with the court or other competent authority of a State Party in which legal proceedings are instituted in respect of claims subject to limitation.

The question arises as to the correct interpretation of institution of legal proceedings within Article 11(1). In *The ICL Vikraman*,[753] points of wide-ranging importance were raised as to the effect of specific provisions of the 1976 Convention. One of the issues was the meaning given to the phrase "legal proceedings" in Article 11(1). It was observed that although the words "legal proceedings" in Article 11(1) did not in their ordinary sense at first suggest the commencement of arbitration, they did so in the context of the 1976 Convention because the 1957 Convention had been construed as covering claims brought by way of arbitration as well as claims brought by court proceedings.[754] And there was nothing in the *travaux preparatoires* to the 1976 Convention which suggests the adoption of the apparently narrower "legal proceedings". Besides, "legal proceedings" should be construed consistently with the general practice of the shipping industry to arbitrate disputes as well as to litigate them.[755] Accordingly, it was confirmed that arbitration proceedings were "legal proceedings" under Article 11(1) of the 1976 Convention. It followed that the shipowners were entitled to constitute a limitation fund in England.

In *The Sylt*,[756] the question is whether the arrest of a vessel may be qualified as legal proceedings under Article 11(1) of the 1976 Convention. It was held by the Dutch Supreme Court that arrest of vessel cannot be considered as "legal proceedings ... instituted in respect of a claim". Nevertheless, this decision appeared to be untenable. Although no express reference is made to the arrest of the ship; nowhere is there any statement suggesting that the arrest cannot be treated as "legal proceedings" for the purposes of Article 11(1). The arrest of a vessel is the preliminary step for the enforcement of a claim on such vessel. Therefore, the arrest of the vessel represented the institution of legal proceedings within Article 11(1). In contrast, in another

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[753] [2003] EWHC 2320 (Comm); [2004] 1 Lloyd's Rep. 21 (QB: Colman J). The vessel *ICL Vikraman* collided with another vessel in the Malacca Strait and sank with the loss of 26 lives and all her cargo.

[754] See *The Penelope II* [1980] 2 Lloyd's Rep. 17 on the 1957 Limitation Convention, although that convention did not contain the words "legal proceedings" but "claims".

[755] The notable example was the construction of "suit " in Article III r. 6 of the Hague Rules in *The Merak* [1964] 2 Lloyd's Rep 527. Just as the commencement of "suit" did not immediately suggest the commencement of arbitration but pointed to proceedings in court, but was held in *The Merak* to attract a wider construction as including arbitration, as was more consistent with the practicalities of the shipping industry.

[756] *Universal Overseas Ltd. v. M.S. Sylt I Schiffahrtsgesellschaft (The Sylt)*, Feb. 28 1992, Hoge Raad. The receivers of cargo carried from Antwerp to Sierra Leone on board *The Sylt* commenced proceedings against owners of *The Sylt* before the High Court of Sierra Leone and obtained a favourable judgment. The cargo owners then arrested the *Sylt* twice in Rotterdam, and the owners obtained her release by providing security. The shipowners commenced limitation proceedings in Rotterdam.

decision rendered by the Dutch Supreme Court *The Sherbro*,[757] it was found that the appointment of a judicial surveyor in France, even if it did not as such involve an actual claim against the owners of the vessel, had to be regarded as "legal proceedings" as meant in Article 11(1) of the 1976 Convention. This point of view was based on the parliamentary history of the ratification of the 1976 Convention in the Netherlands that supported a wide interpretation of the words "legal proceedings". As a result, the owners could limit their liability in France.

The amount of the fund shall be the total of such of the amounts set out in Article 6 (personal injury/death claims and property claims) and Article 7 (passenger claims) as are applicable to the claims against them together with interest running from the date of the occurrence giving rise to the liability until the date of constitution of the fund (i.e. payment is made or guarantee is given).[758] Where there is only one claimant, the shipowner may decide to rely upon Article 10(1) and invoke limitation without constituting the fund. In such a case, when payment to the claimant eventually takes place, this should include interest on the fund from the date of the occurrence as specified in Article 11(1).[759]

The fund so constituted shall be available only for payment of claims in respect of which limitation can be invoked.[760] In consequence, if the claim does not qualify for limitation purposes, the claimant cannot rank against the limitation fund. However, it is possible that if he makes such a claim against the fund he may run the risk of being unable to enforce his claim against the other assets which the person liable may have. It might well be advisable for a claimant who has an unlimitable claim not to submit his claim against the limitation fund if he wishes to pursue the claim against other assets of the shipowner.[761]

The fund could be constituted not only in the form of cash but also alternatively by a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the court or other competent authority.[762]

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[757] NJ 1998, 489, 18 July 1998, Hoge Raad. The vessel *Sherbro* lost containers overboard in the English channel, one of which contained poisonous bagged pesticides which washed up on the Dutch beaches. The cargo interests applied to appoint a judicial surveyor in France. The Dutch state removed the bags from the beaches and took preventive steps to avoid further pollution to the environment, incurring substantial costs. The state arrested the vessel in Amsterdam and received a bank guarantee in exchange for releasing the vessel. The shipowners filed an application for limitation of their liability with the Dunkirk Tribunal de Commerce and constituted a limitation fund as well. They then claimed back the bank guarantee. The dispute actually followed from the difference between the Netherlands and France in respect of the implementation of the 1976 Convention. Both parties had made a reservation in respect of claims for removal of ship and cargo under Article 2(1)(d)(e) of the 1976 Convention, but in different ways. It seems French national law did not effectively incorporate the reservation. France had excluded claims for wreck removal from limitation, but allowed limitation for cargo removal claims. Dutch national law excluded both types of claims and provided for a much higher separate wreck/cargo removal fund.

[758] The interest rate payable is left entirely to national legislation to stipulate.

[759] See Article 10(2) and 12 (distribution of the fund) of the 1976 Convention.

[760] See Article 11(1) of the 1976 Convention and Article 2(3) of the 1957 Convention.

[761] The wording of Article 13(1) suggests that as long as a limitation fund has been constituted and the claimant has made a claim against the fund that claimant is debarred from pursuing his claim against any other asset of the person seeking to limit even it the claim is not qualified in the limitation proceedings. See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd. ed., London: L.L.P., 1998, p. 55.

[762] Article 11(2) of the 1976 Convention.

Most of jurisdictions will accept either a cash deposit or a guarantee. Where the fund is constituted by one of the persons alleged to be liable or by his insurer, it shall be deemed as constituted by all such persons.[763]

7.1.3 Bar to other Actions

Both the 1957 and 1976 Conventions provide where a limitation fund has been constituted in a State Party to the Convention, any person with a claim against the fund is debarred from exercising any right in respect of such claim against any other assets of the shipowner and shall exercise their rights solely against the constituted fund.[764] It should be noted that a claimant who has not made a claim against the fund is not barred by the convention from pursuing the other assets of the shipowner.

In addition, it is provided by Article 13(2) of the 1976 Convention and Article 5 of the 1957 Convention that once the fund has been constituted courts are granted discretion to order the release of the vessel or any other property which has been arrested or attached within the jurisdiction of a State Party or any security given. Under certain circumstances, such order of release is mandatory. This provision is intended to give the shipowner with the right to limitation some control over the number of jurisdictions in which he must face proceedings.[765]

Although Article 13(2) restates the underlying principle of the 1957 Convention, one should note the effect of burden of proof under the two Conventions on the bar to other actions. Jurisprudence indicates that under the 1957 Convention, in order to invoke the court's release order of arrest of vessel or attachment of property, the shipowner must show that there is no serious question to be tried in relation to the absence of actual fault or privity on his part.[766]

For example, in *The Wladyslaw Lokietek*[767], where the 1957 Convention was applicable at that time, it was held that even if a limitation fund was established in another court (Poland), the vessel would not be released from arrest in England unless the shipowner could prove to be clear of any serious questions in relation to actual fault or privity on his part. It was not enough for him merely to show that he had a

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[763] Article 11(3) of the 1976 Convention.

[764] See Article 13(1) of the 1976 Convention and Article 2(4) of the 1957 Convention. In the words of Lord Denning: The object is plain enough. If a ship is involved in a collision in circumstances in which the owner is entitled to limit his liability, then he should only be compelled to provide a limitation fund once and for all. If he makes it available in one country to meet all the limited claims, he should not be compelled to put up security for those claims in another country; or, if he is compelled to do so, he should be able to get the additional security released. See *The Putbus* [1969] P. 136, 149.

[765] Robert Grime, *Shipping Law*, London: Sweet & Maxwell Ltd., 2nd ed., 1991, p. 265.

[766] See, e.g., *The Wladyslaw Lokietek* [1978] 2 Lloyd's Rep. 520; V*alley Towing Ltd. v. Celtic Shipyards Ltd.*, [1995] 3 F.C. 527 (Can. F.C.). Presumably, it is also attributed to the wording of Article 5(1) of the 1957 Convention: "Whenever a shipowner is entitled to limit his liability under this Convention…".

[767] [1978] 2 Lloyd's Rep. 520. Following a collision in the Baltic Sea the claimants arrested a sistership of the shipowners, *Wladyslaw Lokietek* in England. The shipowners brought proceedings in the Polish court for the purpose of limiting their liability and constituted a limitation fund. One day later they gave security to the claimants in the form of a guarantee by their P & I Club and the *Wladyslaw Lokietek* was released from arrest in England. The shipowners applied for the release of the guarantee.

prima facie case or a reasonably arguable case for limitation.[768] It seems that the shipowner might have small chance of being able to show that there is no such serious question at the early stage of an application, consequently there would be very limited scope for successful applications for limitation under the 1957 Convention.

In contrast, under the 1976 Convention, this requirement seems to be unnecessary because the burden of proof of whether there is a loss of right to limit has been shifted from the shipowner as under the 1957 Convention to the claimants. Therefore, once the limitation fund has been constituted in accordance with Article 11 of the Convention, bar to other actions can be more effectively achieved under the 1976 Convention.

In *The Bowbelle*,[769] Sheen J stated that the 1976 Convention was intended to overcome the effect of the decision in *The Wladyslaw Lokietek* and to ensure that shipowners would only be compelled to provide one limitation fund under Article 11. Common sense dictates that there should be some machinery (i.e. Article 13) by which warning can be given to would-be arrestors that they should not arrest any of the ships belonging to the owners of the *Bowbelle*, because the owners had already set up a limitation fund. If one of the ships in the same ownership as *Bowbelle* were to be arrested the Court would be bound to order its release.

Article 13(2) clearly distinguishes between circumstances where the court is obliged to release the vessel or property which has been arrested or attached in its jurisdiction and those where it has a discretion whether to release. The court shall always release the vessel or property if the limitation fund has been constituted in the following jurisdictions: (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or (c) at the port of discharge in respect of damage to cargo; or (d) in the State where the arrest is made. In other circumstance the court has discretion whether to release the vessel or property. Article 5(2) of the 1957 Convention provides to a similar effect.

However, if a claimant has arrested the property of a shipowner in a country which is not a party to the 1976 Convention, the constitution of a fund under the 1976 Convention will not require to release either that property or any security obtained for the release of that property. In *The ICL Vikraman*,[770] the shipowner had commenced a limitation action in London and constituted a limitation fund by making a payment into court under the 1976 Convention. The Taiwanese cargo owner brought *in rem* proceedings in Singapore against a sister ship and obtained a letter of undertaking (LOU) from the shipowners' P&I Club as condition of release of the vessel from

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[768] Similarly, in V*alley Towing Ltd. v. Celtic Shipyards Ltd.*, [1995] 3 F.C. 527 (Can. F.C.), (the Canadian Shipping Act at that time reflected the provisions of the 1957 Convention) the collision was proved to be caused purely by navigational error, which would constitute more than just a *prima facie* or reasonably arguable case, thereby discharging the shipowner's onus of proof. Hargrave, P., observed that in Canada, as in the U.K. prior to the coming into force of the 1976 Convention, a stay of proceedings in limitation is discretionary and security may be ordered to the full value of the claims even where a limitation fund is constituted.

[769] [1990] 1 Lloyd's Rep. 533. Following the tragic collision between the ships *Bowbelle* and *Marchioness* in the River Thames involving loss of life, the owners of the *Bowbelle* established a limitation fund under the 1976 Convention.

[770] [2003] EWHC 2320 (Comm); [2004] 1 Lloyd's Rep. 21 (QB: Colman J).

arrest. The point of interest concerns whether the LOU could be released pursuant to Article 13(2) of the 1976 Convention. It was held that the court had no jurisdiction to order the release of security because the LOU was given in respect of an arrest in Singapore, which was not a state party to the 1976 Convention (Singapore applied the 1957 Convention at that time[771]), there was therefore no basis for the operation of Article 13(2). The geographical scope of the 1976 Convention, as indicated by Article 15, was confined to State Parties. Thus, it only applied where a shipowner sought to limit his liability before the court of a State Party or where the release was sought of a ship arrested or of security given within a State Party. The 1976 Convention did not prevent claimants from obtaining and enforcing security in a jurisdiction which was not a State Party.

The purpose of Article 13 was to protect the person who had properly constituted a limitation fund in any State Party from the enforcement of a claim in respect of the same occurrence against his ships, his property or such security as he might have given which were subject to the jurisdiction of the same or any other State Party. As such, cargo claimants who had arrested in a non-1976 Convention jurisdiction and obtained security in response, were able to avoid the 1976 Convention notwithstanding that their underlying claim was arbitrated in London subject to English law and that the shipowner was entitled to and did commence a limitation action in the U.K.

Pursuant to Article 13(3) of the 1976 Convention, the rights contained in Article 13(1) and (2) apply only if the claimant may bring a claim against the limitation fund before the court administering that fund and the fund is actually available and freely transferable in respect of that claim.

Thus, the power to release the property or security only arose if the limitation fund was "actually available" and "freely transferable" within the meaning of Article 13(3). Still in *The ICL Vikraman*,[772] the issue was whether the fund is actually available before a limitation decree is granted. Citing *The Bowbelle,*[773] the words "actually available" were implicitly construed as meaning that the limitation fund should at the relevant time be in place in accordance with the procedure of the court and should be ultimately available to secure the claimant's claim. No mention was made of a requirement that there be a limitation decree. A limitation fund which had already been constituted was actually available to a given claimant within the meaning of Article 13(3) notwithstanding the absence of a limitation decree and this availability continued unless and until the claimant discharged the burden of proving that the shipowner was not entitled to a limitation decree.[774]

The words "freely transferable" were introduced for the purpose of ensuring that the constitution of a limitation fund would only bar actions in other jurisdictions provided that currency regulations did not limit free transfer of any limitation amounts from the

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[771] The 1976 Limitation Convention is effective for Singapore as of May 1st, 2005.

[772] [2003] EWHC 2320 (Comm); [2004] 1 Lloyd's Rep. 21 (QB: Colman J).

[773] [1990] 1 Lloyd's Rep 532.

[774] This is also approved by authors in Marsden, *Collisions at Sea*, 13th ed., London: Sweet & Maxwell Ltd. (2003), para. 16-22 and N. Meeson, *Admiralty Jurisdiction and Practice*, 3rd ed., London: L.L.P. (2003), para. 8.80.

State in question.[775]

7.1.4 Distribution of the Fund

Both Article 12(1) of the 1976 Convention and Article 3(2) of the 1957 Convention provide to the effect that the limitation fund is to be distributed among the claimants in proportion to their established claims against the fund. In other words, the fund is not distributed in proportion to the claims as calculated and submitted but in proportion to the claims as ultimately recognized and allowed by the court. Whether interest earned by the fund after its constitution is to be distributed among the claimants is not specifically mentioned in the Convention. Presumably, this would be dealt with according to the law of the State in which the fund is constituted. It is likely that such interest earned after the constitution of the fund will be distributed amongst established claims.

Considering that the various claimants might locate widely, the court has to give due notice and publicity before it made an order for distribution of the fund. Normally the court will advertise so that any other potential claimants against the limitation fund can have an opportunity to file a claim against this fund or to take steps to set aside the decree of limitation. It should be noted that a lien that might have originally conferred on the claimant is irrelevant to the *pro rata* distribution of the limitation fund. Personal death/injury claimants enjoy preferential treatment only when the shipowner succeeds in effectively limiting his liability. If he is denied the limitation privilege, all claimants rank equally; and in the event that the proceeds available from the sale of the ship are insufficient to satisfy all the claims, unsatisfied or partly unsatisfied claimants would only have further recourse against any other assets which the shipowners might have.[776]

Article 12(2) merely confirms the law as it stood prior to the 1976 Convention, although in different wording;[777] namely, if before the fund is distributed, the person liable or his insurer has settled a claim against the fund direct with the claimant he may acquire by subrogation the rights which the person compensated would have enjoyed in distribution of the limitation fund under the Convention.[778] Such right of subrogation may also be exercised by persons other than the person liable or his insurer, but only to the extent that it is permitted by the applicable national law.

In addition, a sufficient sum of the fund can be provisionally set aside for use at a future time to cope with claims arising out of the same occurrence but not yet presented or proved against the person liable at the time of the distribution of the fund.[779] This is to protect a person who anticipates an additional future liability and does not wish to be prejudiced by the distribution of the fund before the future

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[775] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd ed., London: L.L.P., 1998, p. 56.

[776] Christopher Hill, *Maritime Law*, 5th ed., London: L.L.P., 1998, p. 390-392.

[777] See Article 3(3) of the 1957 Convention

[778] See, e.g., *The Leerort*, [2001] 2 Lloyd's Rep. 291. Following the collision between the ship *Zim Piraeus* and the ship *Leerort* in the port of Colombo, the owners of *Zim Piraeus* agreed to pay to the owners of *Leerort* and others U.S. $12m under a side agreement. This entitled the owners of *Zim Piraeus* to step into the owners of the shoes of *Leerort* and to make a subrogated claim on their own fund.

[779] See Article 12(4) of the 1976 Convention and Article 3(4) of the 1957 Convention.

liability materializes. Thus, the subrogated rights of the person liable for a future time are preserved.

Legal Costs

Both Conventions are silent on the question of legal costs. It is submitted that if costs are recoverable at all then they are recoverable not as part of the claim against the fund but in addition to the fund to the extent that a court, in exercising its discretion in relation to costs, determines what costs shall be paid and by whom. In other words, the limitation fund was exclusive of legal costs.[780]

This was confirmed in an Australian case of *The Robert Whitmore*,[781] where personal injuries were incurred due to the collision of the pilot vessel *Robert Whitmore* and a dinghy in Newcastle harbor. It was held that a limitation fund established under Article 11 of the 1976 Convention was exclusive of any legal costs which might have been incurred in establishing a claim against the fund. It was apparent that phrases in Article 2 carried a literal meaning which went no further than their express words: it simply meant a claim for compensation for personal or property loss. Therefore the costs of establishing a claim against a limitation fund shall be dealt with separately from the limitation fund itself.

As to who should bear the costs of limitation proceedings, it was illustrated in the case of *The Capitan San Luis,*[782] where a collision occurred between the vessel *Capitan San Luis* and the cruise liner *Celebration* off the coast of Cuba and limitation of liability was sought under the 1976 Convention. As was already discussed, there was a radical difference between the case where the shipowner had to prove that the damage occurred without his actual fault or privity before he was entitled to a decree, and the case where the shipowner was entitled to a decree unless the claimant proved either that he intended to cause the loss or that he acted recklessly and with knowledge that damage would probably result. Under the 1976 Convention the shipowner merely had to establish that the claim fell within Article 2 of the Convention.

Therefore, the correct approach to costs in circumstances where the 1976 Convention applies is, in general, the shipowner should pay the costs of proving those matters which he needs to establish in order to obtain a decree of limitation of liability but that if the claimant chooses to contest the right to limit, the costs should follow the event in the usual manner. That is, if claimants choose to spend money investigating and establishing whether they are entitled to defeat a shipowners' right to limitation they do so at their expense, provided of course that if they ultimately succeed in proving that the incident resulted from the intentional or reckless act required by Article 4 of the 1976 Convention, they are likely to recover their investigating costs on the principle that costs follow the event. However, if at the end of the day the claimants fail to establish the facts necessary to prove the conduct to debar the right to limit, they should bear their own costs and pay those additional costs incurred by the

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[780] See Griggs & Williams, *Limitation of Liability for Maritime Claims*, 3rd ed., London: L.L.P. (1998) p. 54; N. Meeson, *Admiralty Jurisdiction and Practice*, 3rd. ed., London: L.L.P. (2003), para. 8-104.

[781] [2003] NSWSC 888; (2003) 58 NSWLR 548.

[782] [1993] 2 Lloyd's Rep. 573

shipowner in defeating the claimants' challenge.[783]

In the following sections, the procedural rules in the domestic legislations will be examined and analyzed in combination with their implementation in judicial practice. In addition, some graphs are exhibited at the back of this Chapter to illustrate the process of limitation proceedings in the U.K., China and the U.S.

7.2 Under the Domestic Legislations

7.2.1 Under the U.K. Law

As the 1976/1996 Limitation Convention has the force of law in the U.K. by virtue of Section 185(1) of the 1995 Merchant Shipping Act, those specific provisions on constitution and distribution of the limitation fund as well as other procedure rules contained in the Convention are essentially applicable in the U.K. Importantly, in the U.K., the Civil Procedure Rules (CPR) governs those practice rules relating to limitation procedures.

The practical aspects of limitation used to be regulated by the Rules of Supreme Court, Order 75, Rules 37-40.[784] Indeed, limitation procedure under the old rules of the Supreme Court has not changed significantly since the days of the limitation regime prevailing under the 1957 Convention. The existing limitation procedure has been preserved almost entirely as before. This has been achieved by making the Civil Procedure Rules subject to the provisions of a special Admiralty Practice Direction which includes the suitably adapted limitation procedure.[785]

English law has always recognized that the right of limitation may be invoked by one of two methods, i.e. either by way of a separate limitation action for a limitation decree, or as a defence to a claim or a counterclaim.[786] As is discussed previously, the method which a shipowner chooses determines the extent to which the court's decision that he is entitled to limit his liability will protect him. Where limitation is raised by way of defence in a liability action, the defense may only affect the particular claims brought in that liability action. In case the claimed damages prove to be higher than the limit of liability, judgment will be given for the limit.[787] Whereas if an independent limitation action is invoked, it is effective upon all potential claims

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[783] See also, *Yachting New Zealand Incorporated v Birkenfeld*, Court of Appeal of New Zealand, 708 LMLN 1 (2007)

[784] The effect of these old rules can be summarized as follows: (i) Only one claimant on the limitation fund needed to be named as a defendant in the writ. The others could be described generically. (ii) Only one named defendant needed to be served with the writ. (iii) All known claimants on the fund, i.e. named defendants and those described generically, had to be given notice of the payment into Court of the limitation fund. (iv) Only a defendant who had acknowledged service of the writ had to be served with a summons for a limitation decree. (v) Unless such defendant disputed the right to limit, or sought additional information, a decree of limitation would be made on the basis of an affidavit sworn on behalf of the claimant in support of the claim. (vi) The decree had to be advertised. At that stage any claimant on the fund could apply to have the decree set aside. (vii) Such application could lead to the setting aside of the decree and a full blown contested limitation action. See *The Leerort*, [2001] 2 Lloyd's Rep. 291, 299

[785] See Civil Procedure Rules 61.11 and Practice Direction 61.11 which supplements CPR Part 61.

[786] E.g., see PD 10(18): Nothing in rule 61.11 prevents limitation being relied on by way of defence.

[787] See, e.g., *Wheeler v. London & Rochester Trading Co.*, [1957] 1 Lloyd's Rep. 69.

against the same limitation fund.[788]

The following parts will focus on the procedural aspects for initiating the limitation actions under the U.K. legislation.

7.2.1.1 Commencement of Proceedings

Under the U.K. law, it is not necessary that liability should be admitted when invoking the limitation of liability. The limitation action is commenced by a limitation claim in the Admiralty Court which follows the form prescribed in the Practice Direction.[789] The limitation claim is heard by the Admiralty Registrar. The limitation claimant (i.e. the person seeking to limit liability) and at least one defendant (i.e. claimant in respect of the incident to which the limitation action relates) must be named in the claim form, and all other defendants may be described generally.[790] The named defendant(s) would be the representative of the others who would remain unnamed. The limitation claim form (replacing the writ under the old rules) must be accompanied by a declaration setting out the facts upon which the claimant relies and stating the names and addresses (if known) of all persons who, to the knowledge of the claimant, have claims against him in respect of the occurrence to which the claim relates (other than named defendants), verified by a statement of truth.[791]

7.2.1.2 Service of the Limitation Claim Form

One significant change from the old rules is that the limitation claim form has to be served on all named defendants, and any other defendant who requests service upon him.[792] Service of the limitation claim form may be effected out of the jurisdiction with leave;[793] however, this can be a costly and time consuming process.

7.2.1.3 Acknowledgment of Service

An acknowledgment of service is not required. However, every defendant upon whom a claim form is served must within 28 days of service file a defence or a notice that he admits the right of the claimant to limit liability. If such a defendant wishes to dispute

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[788] Christopher Hill, *Maritime Law*, 5th ed., London: L.L.P. (1998), p.414.

[789] 'Limitation claim' means a claim under the Merchant Shipping Act 1995 for the limitation of liability in connection with a ship or other property. 'Admiralty Court' means the Admiralty Court of the Queen's Bench Division of the High Court of Justice, see CPR 61.1(2)

[790] See CPR 61.11 (3). The usual way of doing this is to identify those defendants as "all other persons claiming or being entitled to claim damages by reason of the [particular occurrence]."

[791] See PD 10.1(2)

[792] See CPR 61.11 (4)

[793] See CPR 61.11(5). For example, the interpretation of CPR 61.11(5)© was put forward in *The ICL Vikraman*, [2003] EWHC 2320 (Comm); [2004] 1 Lloyd's Rep. 21 (QB: Colman J). The issue was whether the Admiralty Court had jurisdiction to permit service out of the jurisdiction of the limitation claim form. There was no doubt that the "claim form" referred to in CPR 61.11(5) was one claiming a limitation decree or any ancillary relief. The "claim" referred to in CPR 61.11(5)(c) was construed as meaning claim to limit, rather than the underlying claim against the shipowner; the 1976 Convention was an "applicable Convention"; and Article 11 of the 1976 Convention, which identified where the shipowner could constitute a limitation fund, conferred "jurisdiction" over the claim. It followed that once the shipowners had established the limitation fund, there was jurisdiction to give permission to serve the limitation claim out of the jurisdiction on the cargo claimants who were therefore effectively made party to the limitation claim.

the jurisdiction of the court, or argue that the court should not exercise its jurisdiction, he must file within 14 days of service (or where the claim form is served out of the jurisdiction, within the time specified in CPR Rule 6.22) an acknowledgment of service as set out in the practice direction, as such he will be treated as having accepted that the court has jurisdiction to hear the claim unless he applies to dispute the court's jurisdiction within 14 days after filing the acknowledgment of service.[794]

7.2.1.4 Apply for the Limitation Decree

If one or more named defendants admits the right to limit, the claimant may apply for a restricted limitation decree, and the court will issue a decree limiting liability only against those named defendants who have admitted the claimant's right to limit liability. A restricted limitation decree may be obtained against any named defendant who fails to file a defence within the time specified for doing so and need not be advertised; but a copy must be served on the defendants to whom it applies.[795] The restricted limitation decree is only binding on named defendants.[796]

Where all the defendants upon whom the claim form has been served admit the claimant's right to limit liability, the claimant may apply to the Admiralty Registrar for a general limitation decree. The Registrar will issue a limitation decree pronouncing that he is entitled to limit his liability and directing payment into court of the amount to which his liability is limited within a specified time.[797] Such a decree is good against all the defendants, unless it is set aside.[798]

If one or more of such defendants do not admit the claimant's right to limit, and the claimant seeks a general limitation decree, the claimant must, within 7 days after the date of the filing of the defence of the defendant last served or the expiry of the time for doing so, apply for an appointment before the Registrar for a case management conference.[799] If the Registrar does not grant a general limitation decree, he may order service of a defence, or disclosure by the claimant, or make such other case management directions as may be appropriate.[800]

7.2.1.5 Constitution of Limitation Fund

Same as the provisions of the 1976 Convention, it is not necessary in the U.K. to constitute the limitation fund with the court when commencing a limitation action. It was clear from CPR 61.11 governing limitation claims that the constitution of a limitation fund or the ability to constitute a fund was not a pre-condition to either the jurisdiction itself or the grant of a limitation decree. The obligation to constitute a limitation fund arose only after the Admiralty Registrar or judge had decreed that the person liable was entitled to limit his liability and had calculated the amount of the fund.

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[794] See CPR 61.11 (6)(7)(8)

[795] See CPR 61.11 (9)(10)

[796] For example, in *The Western Regent* [2005] 2 Lloyd's Rep. 54, the limitation claim was brought against Total alone, for it was the only person entitled to claim damages. As such the application was for a restricted limitation decree.

[797] See CPR 61.11 (11)

[798] See *The Falstria* [1988] 1 Lloyd's Rep. 495.

[799] See PD 10(7)

[800] See PD 10(8)

Under English law, a limitation fund is to be constituted by the limitation claimant by paying into court the sterling equivalent of the number of special drawing rights to which he claims to be entitled to limit his liability in accordance with the provisions of the 1995 Merchant Shipping Act together with interest from the date of the occurrence giving rise to the liability until the date of payment into court.[801]

As to the rate at which interest is payable, Paragraph 8(1) of Schedule 7, Part II, to the 1995 MSA provides that the Secretary of State may prescribe the rate of interest to be applied. As such, the interest rate is determined by the Merchant Shipping (Liability of Shipowners and Others) (New Rate of Interest) Order 2004, where "the prescribed rate" is defined to be one per cent more than the base rate quoted from time to time by the Bank of England or the rate of interest set by any body which may supersede it and where there is more than one such rate, the lowest of them.[802][803]

Article 11(2) of the 1976 Convention provides that the fund may be constituted in the form of cash deposit or by a guarantee. Most of jurisdictions accept either a cash deposit or a guarantee. Nevertheless, English law has always fought against constitution of a limitation fund by any other method than a cash deposit and there is nothing in the 1995 Merchant Shipping Act to indicate that this situation has changed. Therefore, it may be that, whilst the U.K. courts still require cash deposits, they will eventually have to accept as sufficient a fund constituted in another State Party by deposit of a guarantee acceptable to the court or other competent authority of that State Party.[804]

The limitation claimant must give written notice to every named defendant of the payment into court specifying the date of the payment in, the amount paid in, the amount and rate of interest included, and the period to which it relates, as well as any excess amount (and interest) paid out to him.[805]

If a limitation fund has been established before a limitation claim is started and the limitation claim is not commenced within 75 days after the date the fund was established, the fund will lapse and all money in court (including interest) will be

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[801] See PD 10(10). However, where the claimant does not know the sterling equivalent on the date of payment into court he may calculate it on the basis of the latest available published sterling equivalent of a special drawing right as fixed by the International Monetary Fund. In the event of the sterling equivalent of a special drawing right on the date of payment into court being different from that used for calculating the amount of that payment into court the claimant may make up any deficiency by making a further payment into court which, if made within 14 days after the payment into court, will be treated, except for the purpose of the rules relating to the accrual of interest on money paid into court, as if made on the date of that payment into court; or apply to the court for payment out of any excess amount (together with any interest accrued) paid into court. See PD 10(11)

[802] This Order (S.I. 2004/931) came into force on 28th April 2004. The Order provides that the rate of interest from 31st December 2003 to be included in the limitation fund constituted by a person seeking to limit his liability by virtue of the 1976 Convention shall be the prescribed rate calculated by reference to a formula where the occurrence takes place before 1 September 1999 but the fund is constituted on or after that date, and the occurrence takes place on or after 1 September 1999.

[803] Interest rates should be based on the principle that the party seeking limitation has kept the claimants out of their money and had the use of it himself. See *The Aldora* [1975] 1 Lloyd's Rep. 617; *The La Pintada* [1984) 2 Lloyd's Rep. 9; *The Abadesa (No. 2)* [1968] P. 656; *The Funabashi* [1972] 1 Lloyd's Rep. 371; *The Garden City (No. 2)* [1984] 2 Lloyd's Rep. 37.

[804] See Article 11(2) of the 1976 Convention

[805] See PD 10(13)

repaid to the person who made the payment into court.[806] The fact that a limitation fund has lapsed does not prevent the establishment of a new fund.[807]

Again, it has already been discussed that once a fund had been constituted with the court in accordance with Article 11 of the 1976 Convention, all persons having rights in relation to the incident in respect of which liability is limited should come in against that fund. Those claimants are prevented from proceeding against the owner's assets and if the owner's vessel or property has already been arrested, it will be released from arrest. The court may stay any proceedings relating to any claims arising out of that occurrence which are pending against the person by whom the fund has been constituted.[808] This includes not only proceedings before judgment, but also proceedings to enforce a judgment.[809] An order for a stay compels other claimants to pursue their claims in the limitation action in the U.K. where they will be subject to the limitation decree. However, it would not prevent them pursuing their claims in other jurisdictions. An anti-suit injunction would be necessary for that purpose. In the U.K., the legislature has decreed that when an order is made by any court of the U.K. under Article 13(2) releasing a vessel or property from arrest, the person applying for such relief is deemed to have submitted to the jurisdiction of that court to adjudicate on the claim for which the ship or property was arrested or attached.[810]

7.2.1.6 Advertisement of Limitation Decree

When a limitation decree is granted, the court may order that any proceedings relating to any claim arising out of the occurrence be stayed, order the claimant to establish a limitation fund if one has not been established or make such other arrangements for payment of claims against which liability is limited. If the decree is a restricted limitation decree, the court may distribute the limitation fund. If the decree is a general limitation decree, it has to be advertised. The court will give directions as to advertisement of the decree and fix a time within which notice of claims against the fund must be filed or an application made to set aside the decree.[811] Until this procedure has been gone through, no payments will be made out of the limitation fund.

When the court grants a general limitation decree, the decree is good against any and all potential claimants on the limitation fund, then the limitation claimant must advertise the decree in such manner and within such time as the court directs; and file a declaration that the decree has been advertised in accordance with the above requirements, as well as copies of the advertisements.[812] Advertising of the decree is not necessary if all the defendants are identified by name and have been served with the limitation claim form. However, in such case, the decree shall operate to protect the limitation claimant only in respect of claims made by the named defendants.

No later than the time set in the decree for filing claims, any defendant who wishes to assert a claim must file and serve his statement of case on the limiting party; and all

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[806] See CPR 61.11(20)

[807] See PD 10(9)

[808] See Para. 8(3) of Sched. 7, Part II, and Section 185 of the 1995 MSA.

[809] See *The Penelope II* [1980] 2 Lloyd's Rep. 17.

[810] See para. 10 of Sched. 7, Part II, and Section 185 of the 1995 MSA.

[811] See CPR 61.11 (13)

[812] See CPR 61.11 (14)

other defendants except where the court orders otherwise.[813] Such statement of case must contain particulars of the defendant's claim.[814] Any defendant who is unable to file and serve a statement of case must file a declaration, verified by a statement of truth, stating the reason for his inability.[815] No later than 7 days after the time for filing claims [or declarations], the Registrar will fix a date for a case management conference at which directions will be given for the further conduct of the proceedings.[816]

7.2.1.7 Setting aside Limitation Decree

Any person other than a defendant upon whom the claim form has been served may apply to the court within the time specified in the decree to have a general limitation decree set aside. An application must be supported by a declaration stating that the applicant has a *bona fide* claim against the limitation claimant arising out of the occurrence and setting out grounds for contending that the claimant is not entitled to the decree, either in the amount of limitation or at all.[817] If the Registrar finds in favor of the applicant he shall set the decree aside and give directions for the further proceedings in the action.[818]

7.2.1.8 Distribution of Limitation Fund

If the shipowners obtain a decree of limitation then the court will distribute the limitation fund amongst the various claimants. The assessment of claims and distribution of the fund in the U.K. is performed by the Admiralty Registrar. As has already been observed, the court may postpone distribution of such part of the limitation fund as it thinks appropriate, having regard to any claims that may be later established before a court outside the United Kingdom. As to interest earned after the constitution of the fund, there is authority to the effect that such interest will be distributed among the claimants against the fund.[819]

It should be recalled that the liens are irrelevant to the distribution of such a limitation fund. In the U.K., it is statutorily provided that no lien or other right in respect of any ship or property shall affect the proportions in which the fund is distributed among several claimants.[820] The fund is distributed *pari passu* in proportion to the claims. The only claimants with any priority against the fund are those for loss of life or personal injury.

7.2.2 Under the Chinese Law

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[813] See CPR 61.11 (15)

[814] See PD 10(15)

[815] See PD 10(16)

[816] See PD 10(17)

[817] See CPR 61.11 (16)(17)

[818] Under both the old rules of Supreme Court and the new practice direction, the procedure envisages that the time at which an unnamed defendant can challenge the right to limit is after the initial decree is made.

[819] See *The Garden City (No. 2)* [1984] 2 Lloyd's Rep. 37.

[820] See Para. 9 of Sched. 7, Part II, and section 185 of the 1995 MSA. This provision restates section 17(2) of the 1958 Act and is intended to overrule a decision of the House of Lords in *The Countess* [1923] A.C. 345 which gave priority to a claimant with a possessory lien over the offending ship, even to the extent of depriving other claimants of all right of recovery against the limitation fund.

China has an independent maritime court system with a network of maritime courts established in the major coastal cities to deal exclusively with maritime cases, i.e. initially in Dalian, Qingdao, Tianjin, Shanghai and Guangzhou in 1984, and later on, another five maritime courts were established in Wuhan, Xiamen, Haikou, Ningbo and Beihai respectively.[821] Each maritime court has jurisdiction over a specific geographical area. The purpose for creating special maritime courts was to create centers of special knowledge and expertise in maritime law. To facilitate the judicial process, some tribunals have been established as well. The decision made by a detached tribunal is of the same effect as that made by the respective maritime court.[822] As was introduced previously, there are four levels in the court system of China, i.e. the Supreme People's Court, the Provincial High People's Court, the Intermediate People's Court and the District or County People's Court. Maritime courts are of the level of Intermediate People's Court and shall only entertain the first instance maritime cases. Before the maritime courts were established in 1984, maritime cases were handled by the economic division of the Intermediate People's Court.[823]

With the purpose to assist in the implementation of the existing Maritime Code, the Special Maritime Procedure Law was adopted by the thirteenth Session of the Standing Committee of the Ninth National People's Congress on December 25, 1999 and entered into force on 1 July 2000.[824] This Law consolidates previous laws and practice and provides a comprehensive set of procedural rules to meet the special needs of maritime proceedings. It shows China's effort to achieve a cohesive maritime legal system. This Procedure Law is the special law on maritime procedures under the general principles set out in the Civil Procedure Law 1991.[825] Where the two differ, the Maritime Procedure Law should prevail.[826] It is expected that the Maritime Procedure Law will have a great impact on maritime practice in China.

Furthermore, in order to correctly try maritime cases, the Supreme Court has issued

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[821] The maritime courts shall entertain actions brought up by relevant parties in respect of maritime torts, maritime contracts and other maritime disputes provided for by law. See Article 4 of the Maritime Procedure Law.

[822] These tribunals are the divisions of the particular maritime court they belong to. For instance, Guangzhou Maritime Court has three detached tribunals located respectively in Shenzhen, Shantou and Zhanjiang.

[823] The independence of the judicial system in Hong Kong Special Administrative Region has remained unchanged after China resumed the exercise of sovereign over Hong Kong from 1 July 1997, since the Chinese government has always emphasized to maintain the principle of one country with two systems. This is confirmed by the Basic Law of the Hong Kong Special Administrative Region. In Hong Kong, the Court of First Instance has jurisdiction in relation to maritime matters. The Court of Appeal hears the appeals for any judgement or order of the Court of First Instance. The parties may appeal to the Court of Final Appeal in certain cases.

[824] See Article 1 of the Procedure Law: This Law is enacted to safeguard the procedural rights of parties in maritime proceedings, and to ensure that the People's courts ascertain the facts, establish liability, apply laws properly and hear maritime cases promptly.

[825] The Civil Procedure Law was adopted at the fourth session of the seventh national people's congress on April 9, 1991 and came into force as of the date of promulgation. This Law has recently being amended and shall be effected as of April 1, 2008

[826] Article 2 of the Procedure Law provides that the Civil Procedure Law and this Law shall apply in maritime proceedings conducted within the territory of China. This Law shall prevail wherever its provisions are applicable. However, where an international treaty concluded or acceded to by China contains provisions that differ from those of the Civil Procedure Law and this Law in respect of foreign-related maritime procedures, those of the international treaty shall prevail, except where China has declared reservations.

specific interpretations with respect to the application of the Special Maritime Procedure Law by the people's courts. The Supreme People's Court Interpretations on the Application of the Special Maritime Procedure Law (Supreme Court Interpretations) was adopted at the 1259th meeting of the Adjudication Committee of the Supreme People's Court on December 3, 2002, and came into force on February 1, 2003. These Interpretations have been largely relied on by the maritime courts in interpreting the provisions of the Maritime Procedure Law and rendering their decisions.

Limitation of liability is an important regime in maritime law. In China, procedural matters relating to limitation of liability are not specifically provided in the Maritime Code, except Article 213 and 214 of the Maritime Code give simple outlines on the constitution of the limitation fund. With the view towards assist the maritime courts in China to implement the substantive stipulations set out in the Maritime Code in respect of limitation of liability for maritime claims, the Special Maritime Procedure Law has introduced detailed provisions in respect of the procedures for constituting a limitation fund for maritime claims and procedures for registration and payment of claims, which will be examined in the following parts.[827]

7.2.2.1 Application

Article 213 of the Maritime Code provides that any person liable claiming the limitation of liability may constitute a limitation fund with a court having jurisdiction. Therefore following a maritime accident, the shipowner, charterer, operator, salvor or insurer may apply to the maritime court to establish a limitation fund for maritime claims. Constitution of the limitation fund is not a prerequisite for invoking the limitation of liability under the Chinese law. Application for the establishment of the limitation fund may be submitted prior to or during the liability proceedings as a defense; however, such application shall be made prior to the delivery of the first instance judgment.[828] Establishment of a limitation fund shall not be bound by any agreement between the parties regarding jurisdiction or arbitration.[829] Application for establishment of a limitation fund prior to proceedings shall be submitted to the maritime court of the place where the accident occurred, or the contract was performed, or the vessel was arrested.[830] Whereas such an application during proceedings shall be submitted to the maritime court which entertains the relevant maritime disputes, except there is any valid agreement between the parties regarding jurisdiction or arbitration.[831]

Application for the constitution of limitation funds should be submitted in writing to the maritime court, stating name and address of the applicant(s), details of the vessel and the incident involved, the amount of the limitation fund and the grounds thereof, as well as the names, addresses and means of communications of all interested parties known to the applicant, and with relevant evidence attached.[832]

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[827] See Chapter 9 and Chapter 10 of the Maritime Procedure Law

[828] See Article 101 of the Procedure Law. For judicial explanation of the procedures for constituting the limitation fund under the Procedure Law, see *M/V Quancheng*, Collection of Maritime Cases, Xiamen Univ. Press (2004), p.339-346.

[829] See Article 103 of the Procedure Law

[830] See Article 102 of the Procedure Law

[831] See Article 81 of the Supreme Court Interpretations.

[832] See Article 104 of the Procedure Law

7.2.2.2 Notice and Objection

Within seven days of receipt of an application for the constitution of the limitation fund, the maritime court shall notify all known interested parties, and at the same time issue a public notice through newspapers or other news media,[833] which should include the name of the applicant, the facts and grounds of the application, matters in respect of the constitution of the limitation fund and registration of claims, and other matters deemed to be necessary for the notice, such as the time limit for objection.[834]

Any interested party may submit an objection to the application in writing to the maritime court within seven days of receipt of the notification or, where a notification has not been received, within thirty days of the public notice. Within fifteen days of receipt of a written objection, the maritime court shall examine the case and grant a ruling either to reject the application if the objection is found established, or to allow constitution of the limitation fund if the objection is found not established. Within seven days of receipt of the ruling, any party that refuses to accept the ruling may file an appeal. The People's Court of second instance shall render a ruling within fifteen days of receipt of the appeal.[835] Where no objection has been submitted by interested parties within the specified time limit, the maritime court will grant a ruling to allow the limitation fund to be constituted.[836]

According to Article 83 of the Supreme Court Interpretations, the maritime court will examine three aspects to decide whether the objection to the constitution of the limitation fund is established. Firstly, the qualification of the applicant shall be examined, such as whether applicant is the person subject to limitation under the Maritime Code, whether the vessel is the vessel defined in the Code. For example, in *The Ningwuji 181*,[837] the vessel involved *Ningwuji 181* was determined by the court to be a vessel intended for inland navigation, therefore the application by the charterer for constituting the limitation fund was denied.

The second is the nature of the claims involved in the incident, that is, to identify whether the relevant claim is subject to limitation and arises out of the same incident, since the limitation fund is intended solely for limitable claims. For instance, in *The M/V Dae Yong*,[838] the court concluded that the claim for pollution damage caused by leak of chemicals (styrene) arising from collision of two vessels was subject to limitation since such claim was not enumerated in Article 208 of the Maritime Code (claims not subject to limitation) and came within the domain of Article 207 of the Code (claims subject to limitation). Therefore the applicant shipowner was allowed to

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[833] The public notice shall be published 3 days consecutively through newspapers or other news media. See Article 82 of the Supreme Court Interpretations.

[834] See Article 105 of the Procedure Law

[835] See Article 106 of the Procedure Law For example, in *M/V Yishan,* the objection submitted by one claimant within the notice period was denied by both the maritime court and the appeal court after examining and finding that the relevant claim is subject to limitation. Therefore, the applicant is allowed to constitute the limitation fund. See http://www.ccmt.org.cn/

[836] Article 107 of the Procedure Law

[837] See http://www.ccmt.org.cn/

[838] See http://www.snet.com.cn, Shanghai Mar. Court (Ji Zi) Civil Ruling No.5 (2002); Shanghai Higher Court (Ji Zi) Civil Ruling No.1 (2002).

constitute the limitation fund.[839]

Thirdly, the maritime court needs to examine if the amount of the limitation fund to be constituted is appropriate. For example, in *The Yongmao No.2*,[840] after receiving the objections from the three claimants, Shanghai Maritime court examined the case and found that the applicant was the owner of the vessel and the claims proved to come within limitation claims. As to the amount of limitation fund, the vessel involved was found to be engaged in coastal transport. Accordingly, it was held by the court that the limitation fund was allowed to be constituted and calculated in accordance with the Regulations on Vessels Less Than 300 tons and Vessels in Coastal Transport, instead of the Maritime Code.

7.2.2.3 Constitution of Limitation Fund

After the ruling for the constitution of the limitation fund comes into effect, that is, no objection has been made by interested parties within the time limit, or the objection is denied and no appeal is filed, or the appeal is denied, the applicant shall, within three days, constitute the limitation fund with the maritime court. Failure to constitute the limitation fund within the time limit shall be deemed as voluntary withdrawal of the application.[841] For example, in *The M/V Yinhong*,[842] where the vessel *Yinhong* collided with another vessel *Suigangxin No.202*, both shipowners applied to constitute the limitation fund. However, the owner of *Yinhong* didn't constitute a limitation fund within the prescribed time period, as a result, its application was deemed as being voluntarily withdrawn because without the limitation fund, it didn't make any sense to further confirm the claim to participate in the distribution of the limitation fund.

The limitation fund can be established by means of a cash deposit or the provision of security that is approved by the maritime court. Normally, the security provided by the bank or other financial institutions should be recognized by the court. For instance, in *The M/V Mingriguang No.1*,[843] the shipowners provided the letter of undertaking issued by the People's Insurance Company of China and constituted the limitation fund.

The amount of the limitation fund shall be the sum set out respectively in Articles 210 and 211 of the Maritime Code together with the interest thereon from the date of the incident giving rise to the liability to the date of constitution of the limitation fund.[844] Where the fund is constituted in the form of security, the amount of security shall cover the amount of the limitation fund plus interest during the period of the constitution of the limitation fund. The date of constitution of the limitation fund

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[839] Indeed, there is certain dispute as to whether claims for chemical pollution damage should be subject to limitation since neither Article 207 nor 208 refers specifically to such claims; besides, China has not yet adopted any Convention on liability for carriage of hazardous and noxious substances by sea. Those who are in favour of excluding such claims from limitation of liability contained in the Maritime Code are mainly concerned about the severe aftermath caused by such pollution damage.

[840] See http://www.ccmt.org.cn/, Shanghai Mar. Court (Ji Zi) Civil Ruling No.6 (2002)

[841] See Article 84 of the Supreme Court Interpretations.

[842] See http://www.ccmt.org.cn/

[843] See http://www.ccmt.org.cn/. Collision occurred between the Chinese vessel *Mingriguang No.1* and the Korean vessel *Ziteng*; as a result, the latter vessel suffered great damage of both vessel and cargo on board. The shipowner of *Mingriguang No.1* applied to the Zhanjiang Tribunal of Guangzhou Maritime Court for constituting the limitation fund.

[844] See Article 213 of the Maritime Code

should be, where the fund is constituted in the form of cash, the date that the limitation amount arrives at the account designated by the maritime court, or where the fund is constituted in the form of security, the date on which the security is accepted by the maritime court.[845]

After the constitution of the limitation fund, the parties shall commence proceedings concerning the maritime dispute before the maritime court where such fund has been constituted, unless an agreement by the parties as to jurisdiction or arbitration provides otherwise.[846] The applicant shall be liable for any loss consequently sustained by the interested parties because of his wrongful application.[847]

It is to be noted that the Maritime Code does not specify the date for converting the SDR into domestic currency for the purpose of constituting the limitation fund; the only relevant provision could be found in Article 277 of the Maritime Code which provides the amount of the Chinese currency (RMB) in terms of the SDR shall be that computed on the basis of the method of conversion established by the authorities in charge of foreign exchange control in China on the date of the judgment by the court or the date of the award by the arbitration organization or the date mutually agreed upon by the parties. It is an omission when drafting the Code. As a result, the judiciary may easily use their discretion to render different decisions. For example, in *The M/V Dae Yong*,[848] it was held by Shanghai Maritime Court that the limitation fund was calculated based on the conversion rate on the date of the accident.[849] By reference with Article 8 of the 1976 Limitation Convention which provides that the limitation amounts shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given, it is submitted that the appropriate date for converting the limits of liability should be on the date of constituting the limitation fund or providing the security.[850] Therefore, it is suggested to clarify the situation when amending the Code, or alternatively, to deal with it through judicial directive issued by the Supreme Court, so as to avoid inconsistency in the maritime jurisprudence.

Bar to other Actions

Article 214 of the Maritime Code provides that "where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested

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[845] See Article 108 of the Procedure Law

[846] Article 109 of the Procedure Law.

[847] Article 110 of the Procedure Law

[848] See http://www.snet.com.cn, Shanghai Mar. Court (Ji Zi) Civil Ruling No.5 (2002); Shanghai Higher Court (Ji Zi) Civil Ruling No.1 (2002).

[849] See also, *The Xiangshun*, Shanghai Mar. Court (Ji Zi) Civil Ruling No.1 (2002); *The Yongmao No. 2*, Shanghai Mar. Court (Ji Zi) Civil Ruling No.6 (2002).

[850] Indeed, some maritime courts have held that the limitation fund was calculated based on the conversion rate on the date of constitution of limitation fund. See, e.g., *The Minrangong No.2*, Guangzhou Mar. Court (Shi Zi) Civil Ruling No. 76 (1999); *The Kaitone No.6*, Guangzhou Mar. Court (Shi Zi) Civil Ruling No.74 (1997); *The Minhai No.105*, Ningbo Mar. Court (Chu Zi) No.12 (1997); *The Le'an No.2*, Ningbo Mar. Court (Chu Zi) No.32 (1997); *The Pine Hope*, Ningbo Mar. Court (Xian Zi) Civil Ruling No. 1 (2004).

or attached, or, where a security has been provided by such person, the court shall promptly order the release of the ship arrested or the property attached or the return of the security provided." This Article is a simplified version of Article 13 of the 1976 Convention with respect to barring to other actions.

However, Article 214 has caused some confusion because "any person having made a claim against the person liable" may also include claimants with claims not subject to limitation, while provision on bar to actions seems to be intended for claimants with limitable claims. The rights of the claimants with unlimitable claims should not be restricted by the constitution of the limitation fund, and as a matter of fact, they are not entitled to make claims against the limitation fund. Thus, under the language of this provision it is possible that these claimants cannot enforce their right against any assets of the person liable. Certainly, this defect will be corrected when the Maritime Code is amended. In addition, to make this provision more clear to avoid any unnecessary misunderstanding, some word may be added to the original text, i.e., any *other* assets of the person liable than the limitation fund.

It is good to see that this drafting defect in the Maritime Code has already been noted in the Supreme Court Interpretations. By reference to the corresponding provision in the 1976 Convention which adopts the wording "any person having made a claim against the fund",[851] Article 86 of the Interpretations provides that where a limitation fund has been constituted, any person having made a claim *against the fund* may not exercise any right in respect of such claim against any *other* assets of the person by or on behalf of whom the fund has been constituted. This is essentially the same as the language in Article 13(1) of the 1976 Convention.

In addition, by reference to Article 11(3) of the 1976 Convention, it is submitted that some provision should be added to provide explicitly that the limitation fund established by any person liable shall be deemed constituted by all the persons liable, including the shipowners, salvors and the persons they are responsible, as well as insurers.[852]

7.2.2.4 Registration and Payment of Claims

According to Article 112 of the Maritime Procedure Law, after a public notice has been issued by a maritime court, creditors shall apply to register their claims in respect of the maritime accident within the period of notice; and if they fail to do so, their claims shall be deemed to have been waived. However, there is some loophole in the wording of this provision; indeed, the real intention of the drafter is, claims *against the limitation fund*, if not registered, shall be deemed to be waived. It is submitted to make this point clarified either by amending the Procedure Law or by judicial interpretation issued by the Supreme Court.

When applying to register the claim with the maritime court, the creditor shall submit written application and provide evidence of the claim. Evidence of the claim includes legally effective judgment, ruling, conciliation statement, arbitration award and notarized document of creditor's rights, as well as other supportive evidential

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[851] See Article 13(1) of the 1976 Convention

[852] See *M/V Jingshuiquan*, Cases in Maritime Law, Law Press (2003), p. 291-301.

materials that prove the existence of maritime claims.[853] The maritime court will examine the creditor's application, and allow claims that are proved by evidence to be registered, or reject those that are not.[854]

After confirming the claims, the maritime court shall notify creditors and arrange the creditors' meeting.[855] At the meeting, creditors may propose the plan for distribution of the limitation fund through negotiation and conclude the distribution agreement. Such an agreement is legally effective when approved by the maritime court. Where the creditors' meeting fails to reach an agreement, the maritime court will, in accordance with the provisions contained in the Maritime Code and other relevant laws, grant ruling on distribution of the limitation fund.[856]

The principle for distributing the limitation fund is basically that, the fund together with the interests shall be distributed among the claimants in proportion to their established claims which are subject to limitation. Personal death/injury claims shall enjoy preferential treatment compared with the property claims. Claims for damage to harbor works shall have priority over other property claims.[857] It is to be noted that under the Chinese law, maritime liens shall not affect the implementation of the limitation of liability for maritime claims.[858] Accordingly, in distributing the limitation fund, the *pro rata* principle will be maintained.

As is indicated above, the primary goal for drafting the Special Maritime Procedure Law is to coordinate the substantive rules with the procedural rules. The procedures on the constitution of a limitation fund are mainly intended to realize the substantive right of limitation as provided in the Maritime Code. However, it is noteworthy that this Procedure Law only makes provisions on the procedures of constituting limitation fund, but not procedures of limitation proceedings. This has incurred some confusions and disputes in judicial practice, because the substantive limitation rights of the shipowners can not be adequately secured by the procedural provisions.

According to Article 83 of the Supreme Court Interpretations, the court only examines the qualification of the applicant, the nature of the claims involved and the amount of the limitation fund to be constituted. As a result, the crucial question as to whether the applicant is entitled to limit his liability is not examined by the court and will be dealt with in the relevant liability action.[859] For example in *The M/V Foshan No. 8*,[860] in

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[853] See Article 113 of the Procedure Law

[854] See Article 114 of the Procedure Law. The maritime court shall examine the judgment, ruling, conciliation statement, arbitration award or notarised document of creditor's right submitted by the creditor as evidence of the claim and confirm those documents where they are found to be authentic and lawful. Where the creditors provide other evidence for the maritime claims, they shall, within 7 days after registration of the claims, commence proceedings before the maritime court of registration to confirm their right of claims. Where the parities conclude an arbitration agreement, they shall promptly apply for arbitration. The judgment or ruling rendered by the maritime court confirming the right of claims is final and unappealable. See Article 115&116 of the Procedure Law, and Article 90 of the Supreme Court Interpretations.

[855] See Article 117 of the Procedure Law

[856] See Article 118 of the Procedure Law

[857] See Article 210 of the Maritime Code, and Chapter 6 of this paper.

[858] See Article 30 of the Maritime Code

[859] Actually prior to the enactment of the Maritime Procedure Law, the maritime court did examine whether the applicant was entitled to limit its liability and allow constitution of limitation fund only on the basis that the applicant was entitled to limitation.

the application for constituting the limitation fund by the shipowner of *Foshan No. 8*, the shipowner of another vessel *Anshunda* and cargo owners submitted objection, claiming that the collision was caused by the intentional or reckless act of the applicant. However, the objection was rejected as the maritime court observed that the issue of whether the applicant is debarred from limitation of liability should be handled in the relevant liability action. Constitution of a limitation fund does not necessarily indicate that the applicant will be entitled to limit his liability.

Indeed, there were opposite opinions among Chinese scholars and judiciary as to whether the court should examine the question of the applicant's right to limit when drafting the Maritime Procedure Law. One side favored establishing procedures for limitation proceedings, therefore the court shall examine whether the applicant is entitled to limit before ordering constitution of the limitation fund. The opposing side favored establishing only procedures for constituting the limitation fund in order to achieve simplification. Eventually the drafters adopted the second opinion. After the Procedure Law and its supplemental Interpretations were promulgated, the debate has become even hotter than before to a certain extent. Various interpretations and judicial practices will certainly affect the unified application of the limitation law. Hopefully, this controversy will be addressed soon by the interpretation from the Supreme Court.

7.2.3 Under the U.S. Law

Under the U.S. law, Section 185 of the Limitation of Liability Act together with Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure provide the procedural framework for limitation proceedings. In addition to these statutory admiralty rules, jurisprudence and practice play a highly important role to establish the limitation procedure. According to the Limitation Act, shipowners' liability for claims arising from the maritime incident is limited to the value of the ship and its pending freight at the conclusion of the voyage. The admiralty courts have exclusive jurisdiction over limitation issues.[861] For that purpose, the U.S. limitation statute requires the creation of a *concursus* of claims, where all claims against the vessel owner must be brought in a single proceeding in the same venue.[862]

It is submitted that in the U.S., *concursus*, i.e., the power of the admiralty court to bring together into concourse all claims against a shipowner involved in a maritime casualty in a single federal district court, and avoid thereby a multiplicity of actions in different courts and the possibility of varying results in different actions, is the cornerstone of the entire limitation system.[863] *Concursus* is essential to limitation of liability in both substantive and procedural aspects. It protects a shipowner's assets for equal distribution among all claimants.

As such, *concursus* provides a concourse for determination of liability arising out of

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[860] See http://www.ccmt.org.cn/

[861] See *Norwich & New York Transportation Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1872).

[862] For a comprehensive understanding of the limitation of liability practice in the U.S., see generally, Staring, *Limitation Practice and Procedure*, 53 Tul. L. Rev. 1134 (1979).

[863] In *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 415, 1954 AMC 837, 842-43 (1954), Justice Frankfurter stated: The heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants.

marine casualties where asserted claims exceed the value of the vessel, under which effective marshaling of assets can be achieved. Once action for limitation of the vessel owner's liability had been filed, the federal district court has to enjoin further prosecution of any claim against the vessel owner or vessel owner's property in any state or federal court which could be subject to a limitation action and all claimants who might seek damages from the owner as a result of the incident must file their claims against the *concursus* within a court-ordered time frame and share in the limitation fund.[864]

This section will firstly explain the relevant procedural aspects of the limitation action, and then specifically address two distinct features in the limitation procedures under the U.S. limitation law, i.e., the jurisprudential resolution of the conflict between the Limitation Act and the saving to suitors clause, and the time limitation within which to petition limitation of liability.

Under the U.S. law, it has been generally accepted that an owner could assert limitation in either one of two ways: by answer to liability proceedings or by independent limitation action. For example, in *Sana v. Hawaiian Cruises, Ltd.*,[865] the court stated that limitation of liability may be raised by two methods. One method allows a vessel owner to petition for limitation of liability within six months of written notice of possible claims. The alternative method allows limitation to be pleaded as a defense in answer to an earlier filed damage suit.[866] When there is only one single claim, the shipowner probably does not wish to incur the expenses involved in petitioning the limitation, it seems thereby reasonable that the shipowner assert limitation of liability as a defense under Section 183 in the suit brought against him.

7.2.3.1 Procedures for Limitation Actions

7.2.3.1.1 Filing the Complaint

Limitation of liability proceedings are within the original and exclusive jurisdiction of the federal district courts. Therefore, for the purposes of invoking a limitation action, the owner must file a complaint for limitation in an appropriate federal district court.[867] Rule F(2) of the Supplemental Rules requires that the complaint set forth the facts on the basis of which the right to limit liability is asserted by the shipowner. It is not sufficient for the complaint to make only general allegations related to the casualty. Rather, the complaint must state with particularity the voyage in which the casualty from which the owner seeks limitation or exoneration of liability occurred, the facts of the casualty, all then-known outstanding claims related to the voyage, the value of the

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[864] See 46 U.S.C. 185. See also, Gutoff, *A Jurisdictional Prolegomenon to the Limitation of Liability Act*, 32 J. Mar. L. & Com. 203, 204-205 (2001).

[865] 961 F. Supp. 236 (D. Hawaii 1997).

[866] See also, *Grindle v. Fun Charters, Inc.*, 962 F. Supp. 1284 (D. Hawaii 1996), where the court held that limitation of shipowner's liability may be asserted as an affirmative defense in any court; *Tesvich v. 3-A's Towing Co.*, 547 So. 2d 1106 (La. App. 4th Cir. 1989), where it was found that a vessel owner is allowed to plead defense of limitation of liability in state court proceeding, but the defense was denied because the vessel owner failed to prove the value of the vessel plus pending freight. Although this method exists, it is not commonly used.

[867] See Fed. R. Civ. P. Supp. F(9). Admiralty Rule F(9) provides that the complaint shall be filed in any district in which the vessel has been attached or arrested, or if not arrested then in any district in which the owner has been sued with respect to a claim involving the vessel.

vessel involved at the close of the voyage as well as the amount of freight actually received for the voyage and that which still remains to be recovered.[868]

7.2.3.1.2 Constitution of Limitation Fund

Under the U.S. limitation law, when a vessel owner files a complaint for limitation of liability, he must establish the limitation fund for the benefit of claimants. He may deposit with the court a sum equal to the appraised value of his interest in the vessel and freight, or filing an admiralty stipulation with approved security equal to the value of vessel and freight together with interest, or alternatively, transfer his interest in vessel and freight to a trustee appointed by the court.[869] The court has discretion in determining what constitutes appropriate security by balancing the parties' interests.[870] Approved security is not necessarily a domestic formal surety bond. For example, in *The Jablanica*,[871] the argument was whether the Letter of Undertaking signed by the U.K. Mutual Steam Ship Assurance Association (UKMA) was an adequate security. It was held that UKMA was no doubt a responsible insurer in the insurance industry. Its Letter of Undertaking was as a practical matter adequate security under the U.S. limitation law.

It is important to note that the inadequacy in the value of the vessel and her freight as computed by the owner at the time the complaint is filed is not jurisdictional, and will not allow a claimant challenging the limitation action to obtain a dismissal (absent other grounds) but only for an order to increase the security to a proper amount.[872] Section 185 of the Limitation Act provides that the fund shall include such additional sums "as the court may from time to time fix as necessary to carry out the provisions of § 183."[873] Claimants may contest the sufficiency of the owner's fund under Supplemental Rule F(7) by filing a motion with the district court. The claimants would have to provide the court with their own appraisal of the limitation fund, and provide support to show the level of their claims. The court may then determine whether to require a modification of the fund or not.[874]

7.2.3.1.3 Stay

Once a limitation complaint has been filed and the limitation fund is established, the federal district court will issue a stay of all pending proceedings against the owner arising out of the casualty for which limitation is sought, and orders claimants (upon proper notification of the complaint) to file their claims in the limitation *concursus*.[875] The Supreme Court has confirmed that it is by operation of the statute that the posting of the security in a limitation proceeding restrains all other courts of jurisdiction to

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[868] See Fed. R. Civ. P. Supp. F(2). See also *In re M/V Sunshine II,* 808 F.2d 762, 764 (11th Cir. 1987).

[869] See 46 U.S.C. 185 and Rule F(1) of the Supplemental Rules.

[870] See, e.g., *In re Kingston Shipping Co.,* 1982 AMC 134 (M.D. Fla. 1981), aff'd, 667 F.2d 34, 1982 AMC 2705 (11th Cir. 1982). .

[871] Lloyd's Maritime Law Newsletter 0204 (1987)

[872] See *Black Diamond v. Stewart*, 336 U.S. 386, 1949 AMC 393 (1949); *Kristie Leigh Enters. v. American Commercial Lines, Inc.*, 168 F.3d 206, 1999 AMC 1366 (5th Cir. 1999) (recognizing the limitation court's authority to reduce the limitation fund).

[873] 46 U.S.C. 185

[874] Rule F(7) of the Supplemental Rules deals explicitly with the court's power to adjust the security.

[875] See 46 U.S.C. 185 and Fed. R. Civ. P. Supp. F(3). See, e.g., *Pickle v. Char Lee Seafood, Inc.*, 174 F.3d 444, 1999 AMC 1840 (4th Cir. 1999)

hear the claims involved.[876]

7.2.3.1.4 Notice to Claimants

When the court orders the stay, parties who have claims against the vessel's owner are required to pursue those claims in the limitation proceeding. For that purpose, the district court shall issue a notice of the limitation complaint to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court. The district court will require the vessel owner to publish notice of its limitation proceeding in the appropriate newspapers and official publications of the federal district court. The notices run once a week for four consecutive weeks prior to the date set by the district court for filing claims, and the vessel owner must also mail the notice to all persons known to have a claim.[877]

The deadline for filing of claims shall not be less than thirty days after issuance of the notice, although the district court may enlarge the time within which claims may be filed. The district court has discretion to allow claimants to file late claims in the limitation proceeding to the extent a late claimant may be able to provide the court with good cause for the delay of its filing. Such permission may be granted when "the limitation proceeding is pending and undetermined, and the rights of the parties are not adversely affected."[878] Lack of actual notice of the proceeding may be sufficient for a claimant filing late to have his claim heard, despite missing the filing deadline.[879] Thus, a shipowner filing a limitation proceeding should make efforts to ensure that all known claimants are identified and notified of the limitation complaint, that the court issues a proper monition, and that the Marshal carries out publication of the notice.[880]

Once all claims have been filed, the federal district court will determine whether the claims presented will exceed the value of the limitation fund.[881] If it is clear the amount of the claims do not exceed the limitation fund, the district court has the discretion to lift the stay and allow suits to move forward in state court. The federal district court will require all parties to enter into certain stipulations that will adequately protect the vessel owner in both state and federal court.

Should all parties not agree, or if the amount of the claims will exceed the fund, the federal district court will proceed to determine whether the vessel owner is entitled to limit its liability. This involves a two-step process. Firstly, the claimant(s) must establish shipowner's liability and the causality between the owner's negligence and

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[876] See *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U.S. 578 (1883); *The San Pedro*, 223 U.S. 365 (1912)

[877] Fed. R. Civ. P. Supp. F(4).

[878] See *Texas Gulf Sulphur Co. v. Blue Stack Towing Co.*, 313 F.2d 359, 362-63, 1963 AMC 349, 353 (5th Cir. 1963).

[879] See *Lloyd's Leasing Ltd. v. Bates,* 902 F.2d 368 (5th Cir. 1990), where it was held that evidence that the claimants did not speak the language in which the notice was printed or that they lived outside the area of publication will generally sustain a claim of lack of actual notice.

[880] Jill A. Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Tul. Mar. L.J. 659 (2000)

[881] Fed. R. Civ. P. Supp. F(7); *In re Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 1995 AMC 1816 (5th Cir. 1995).

the claimant's damage. If the shipowner was not negligent or the claimant cannot demonstrate a causal connection, the vessel owner is exonerated from liability. Secondly, if the negligence/unseaworthiness and causal connection requirements are satisfied, the burden shifts to the shipowner to demonstrate that no design, neglect, privity or knowledge of the negligence or unseaworthiness may be imputed to the owner.[882] If the shipowner is successful, he will be entitled to limit his liability to the value of the limitation fund. If the shipowner is otherwise unsuccessful, he may be liable in full for any judgments made against him in state and federal courts.[883]

7.2.3.1.5 Distribution of Limitation Fund

If the court determines that the vessel owner is entitled to limitation of liability, the court will distribute the limitation fund on a *pro rata* basis. However, those parties which have priority may be paid first or in a greater proportion to those below them.[884] Courts have generally taken a middle ground, following a *pro rata* distribution but recognizing some priorities. Liens for supplies, salvage, and wreck removal costs may be granted priority.[885]

In general, the judiciary has applied the rule of equitable subordination, rather than the purely mechanistic approach suggested by maritime lien priorities and Supplemental Rule F(8). Therefore, the equities of a case have the greatest influence on the distribution of a limitation fund. The facts of the case dictate the equities.[886] For example, in *The Catskill*,[887] equitable subordination was implemented to give preference to personal injury and cargo claimants over a negligent vessel's claim for collision damages. Innocent claimants are given priority over those negligent parties for the casualty.[888] Late filed claims have often been subordinated to timely filed claims.[889]

7.2.3.2 Conflict with Savings to Suitors Clause

It has been authoritatively decided by the U.S. Supreme Court that the only court with competent jurisdiction over limitation of liability proceedings was a court of admiralty.[890] This original and exclusive jurisdiction of the federal district courts is, however, complicated by another U.S. law known as "saving to suitors clause".[891] While the limitation proceeding affords the shipowner the right to a nonjury trial in a

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[882] See 46 U.S.C. 183(a)(e).

[883] Schoenfeld & Butterworth, *Limitation of Liability: The Defense Perspective*, 28 Tul. Mar. L.J. 219, 221-223 (2004)

[884] See Fed. R. Civ. P. Supp. R. F(8).

[885] See, e.g., *China Union Lines v. A.O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966); *American Cyanamid Co. v. China Union Lines*, 306 F.2d 135 (5th Cir. 1962); *In re California Navigation & Imp. Co.*, 110 F. 678 (N.D. Cal. 1901); *The Leonard Richards*, 41 F. 818 (D.N.J. 1890).

[886] Biezup & Abeel, *The Limitation Fund and Its Distribution*, 53 Tul. L. Rev. 1185, 1203 (1979)

[887] 95 F. 700 (S.D.N.Y. 1899).

[888] See, e.g., *In re The Dodge, Inc.*, 282 F.2d 86 (2d Cir. 1960); *In re Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D.N.Y. 1965), modified, 364 F.2d 118 (2d Cir. 1966); *The Mauch Chunk*, 139 F. 747 (S.D.N.Y. 1905); *In re Lakeland Transp. Co.*, 103 A. 328 (E.D. Mich. 1900).

[889] See *In re Esso Brussels,* 1975 A.M.C. 1121 (S.D.N.Y.).

[890] See *Norwich & New York Transportation Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1872).

[891] 28 U.S.C. 1333(1), which provides the district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

federal court, the saving-to-suitors clause reserves to the claimants the right to a jury trial in a state court. As a result, an inevitable conflict exists between the exclusive jurisdiction of the district court over the limitation proceeding and the right of the claimant to proceed against the owner in state court pursuant to the saving to suitors clause.

Over the years, the U.S. courts have attempted to reconcile this "recurring and inherent conflict"[892] between these two statutes, and hence identified two exceptions where a claimant should be allowed to pursue his state court action outside the limitation proceeding.

The first exception arises where there is only one claimant, which was established by the U.S. Supreme Court in *Ex parte Green*[893] and *Langnes v. Green*[894], and was thereafter refined further by the circuit courts. It is well-recognized that one major purpose of the limitation proceeding is to create a *concursus* to resolve competing claims to the limitation fund. Where there is only one claimant in the limitation proceeding, there is no competition for the limitation fund and therefore no need for a *concursus* of claims in the limitation proceeding. Thus, the single claimant is allowed to try liability and damages issues in his chosen forum by filing stipulations that protect the shipowner's right to have the admiralty court retain exclusive jurisdiction to determine the issues relating to limitation of liability.[895]

The second exception arises where the value of the limitation fund exceeds the aggregate amount of all claims asserted against the shipowner.[896] In such a case, *concursus* may become unnecessary since the shipowner is not exposed to liability in excess of the limitation fund.

In a word, the *concursus* provided by the Limitation Act is of no use where there is only one single claimant and unwarranted where there is an adequate fund to meet all claims. In both cases, however, the district court seized of the limitation proceeding may not lift the stay without first obtaining certain stipulations from the claimants.[897]

7.2.3.2.1 Single Claimant Situation

Determining what constitutes a "single claimant situation" has caused some difficulty for the courts. Certainly, if a claim is not subject to limitation under the Limitation Act, that claim is not taken into account in determining as to whether a multiple claimant situation exists. For example, in *In re S & E Shipping Corp.*,[898] as to the indemnity claim arising out of a license agreement, the court observed that it stemmed from a

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[892] See *Dammers & Vanderheide v. Corona*, 836 F.2d 750, 754, 1988 AMC 1674, 1678 (2d Cir. 1988).

[893] 286 U.S. 437, 1932 AMC 802 (1932).

[894] 282 U.S. 531, 1931 AMC 511 (1931).

[895] Cases falling within this exception are often referred to as single claimant-inadequate fund cases.

[896] See, e.g., *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957); *In re Consolidation Coal Co.*, 123 F.3d 126, 1998 AMC 807 (3d Cir. 1997); *In re Dammers*, 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 1980 AMC 2806 (8th Cir. 1979). Cases falling within this exception are often referred to as multiple claimant-adequate fund cases.

[897] See *Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 4 F.3d 401, 1994 AMC 506 (5th Cir. 1993); *In re Two R Drilling Co.*, 943 F.2d 576, 1992 AMC 1714 (5th Cir. 1991); *Texaco, Inc. v. Williams*, 47 F.3d 765, 1995 AMC 1912 (5th Cir. 1995); *In re Mr. Wayne*, 729 F. Supp. 1124, 1990 AMC 570 (E.D. La. 1989)

[898] 678 F.2d 636, 1982 AMC 2359 (6th Cir. 1982).

personal contract, which was not subject to limitation of liability. Therefore, the existence of this claim would not constitute a multiple claim situation. And the claimants need not include these claims in their protective stipulations.[899]

In addition, the federal court may lift the stay against non-admiralty proceedings when multiple claims asserted against the shipowner are merely derived from a single primary claim. For example, subrogation claim is considered to be derivative of the primary claim in limitation proceedings, because it is entirely dependent upon the primary claim asserted by the claimant.[900] It is generally agreed that a spouse's claim for loss of consortium is a separate and independent claim from any claims the other spouse may have and therefore the multiple claimants exist and the stay will remain.[901] There is also general agreement that potential claims for attorneys' fees or costs against a shipowner by a claimant or a third party creates a multiple claim situation. For example, in *Complaint of Mohawk Associates and Furlong, Inc.*,[902] the court held that the claims for attorney fees and legal expenses in addition to damages constituted a multiple claim situation and *concursus* was therefore necessary.[903] However, there is a split of authority among the circuit courts as to whether contribution and indemnity claims by a third party in a state court action is separate from or derivative of the primary claim.[904][905]

7.2.3.2.2 Adequate Fund/Multiple Claim

In *Lake Tankers Corp. v. Henn*,[906] the Supreme Court held that, when the limitation fund exceeds the total amount of multiple claims filed against the shipowner, claimants should be allowed to pursue their claim in a state court jury trial. The Court observed that a primary purpose of Congress in enacting the Limitation Act was to distribute the limitation fund among the claimants where that fund was inadequate to pay the claims in full. It appeared that the element of inadequate fund was lacking in *Lake Tankers*. To hold otherwise would permit shipowners to avoid jury trials and frustrate a claimant's choice of forum. Similarly, In *Matter of Garvey Marine, Inc.*,[907]

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[899] See also, *W.E. Hedger Transp. Corp. v. Gallotta*, 145 F.2d 870, 1944 AMC 1462 (2d Cir. 1944); *Kattelman v. Otis Eng'g Corp.*, 701 F. Supp. 560, 1990 AMC 578 (E.D. La. 1988).

[900] See, e.g., *In re Humble Oil & Ref. Co.*, 210 F. Supp. 638, 640 (S.D. Tex. 1961), aff'd sub. nom. *Humble Oil & Ref. Co. v. Reagan*, 311 F.2d 576 (5th Cir. 1962).

[901] See *American Export Lines v. Alvez*, 446 U.S. 274, 1980 AMC 618 (1980), where the Court recognized that a cause of action for loss of consortium under the general maritime law is separate and independent from the related tort claim of the other spouse. See also, *In re S & E Shipping Corp.*, 678 F.2d 636 (6th Cir. 1982); *In re Dammers,* 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988); *In re Mr. Wayne*, 729 F. Supp. 1124, 1990 AMC 570 (E.D. La. 1989).

[902] 897 F.Supp. 906 (D.Md. 1995).

[903] See also, *In re S & E Shipping Corp.*, 678 F.2d 636 (6th Cir. 1982); *In re Dammers*, 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988); *Universal Towing v. Barrale*, 595 F.2d 411, 1980 AMC 2803 (8th Cir. 1979).

[904] Some courts have held that these indemnification claims constitute multiple claims and preclude a lifting of the stay. See *Odeco Oil & Gas Co. v. Bonnette*, 74 F.3d 671, 1996 AMC 913 (5th Cir. 1996); *In re Dammers,* 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988). While some courts found that the contribution and indemnity claims was merely derivative and dependent upon the primary claim and therefore did not constitute multiple claim. See *S & E Shipping Corp.*, 678 F.2d 636, 1982 AMC 2359 (6th Cir. 1982); *Kattelman v. Otis Eng'g Corp.*, 696 F. Supp. 1111 (E.D. La. 1988).

[905] See generally, Michael L. Bono, *Protective Stipulations And The Single Claimant Exception In Limitation Of Liability Proceedings*, 17 Tul. Mar. L.J. 257 (1993)

[906] 354 U.S. 147 (1957).

[907] 909 F.Supp. 560 (N.D.Ill. 1995).

it was found that injunction of the state court proceeding under the Limitation Act was inappropriate if the limitation fund exceeded potential liability since there was no need to protect the vessel owner from undue liability or to distribute funds equitably or on a *pro rata* basis.[908]

In practice, the exceptions of single claimant and adequate fund developed by U.S. jurisprudence have been generally adopted to have the stay lifted and allow the claims to proceed in the claimants' chosen forum. For that purpose, the claimants must file certain stipulations to protect the vessel owners' rights under the limitation proceeding.

7.2.3.2.3 Claimants' Stipulations

Generally speaking, the appropriate stipulations should include (1) the shipowner has the right to litigate all issues related to limitation of liability in federal district court; (2) the claimants will not seek a judgment in the state court on the shipowner's right to limit their liability and consent to waive any right to a claim of *res judicata* based on judgment obtained in the state court proceedings and (3) the claimants must stipulate to the sufficiency of the value of the limitation fund.[909]

However, it is not necessary for the claimants to stipulate to the shipowner's assessment of the value of the limitation fund, but rather, they need only stipulate that the federal court will determine the question of the fund's sufficiency. For example, in *Luhr Bros. v. Gagnard*,[910] it was held that in any limitation proceeding the admiralty court must determine the value of the owner's interest in the vessel. An *ex parte* valuation of the vessel and her freight by the shipowner cannot preclude the court's independent evaluation of the adequacy of the limitation fund.

Besides, in drafting a stipulation, the claimants do not have to stipulate to the shipowner's right to limit its liability, it is sufficient for the claimant to recognize the shipowner's right to seek limitation in federal court.[911] If the claimant acknowledges the shipowner's right to limit, the only question remaining in the limitation proceeding is the value of the fund.

However, where the proffered stipulations do not adequately protect the shipowner's right to limitation, the federal court will not lift the stay. For instance, the stipulations must unreservedly acknowledge the exclusive jurisdiction of the federal admiralty court to adjudicate the shipowner's right to limit liability. In *Magnolia Marine*

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[908] See also, in *The Aquitania*, 20 F.2d 457 (2d Cir. 1927); *In re Texas Co.*, 213 F.2d 479 (2d Cir. 1954); *Magnolia Marine Transp. Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1994 AMC 303 (5th Cir. 1992).

[909] See, e.g., *Texaco, Inc. v. Williams*, 47 F.3d 765, 1995 AMC 1912 (5th Cir. 1995)*; Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 1995 AMC 506 (5th Cir. 1993)*; In re Dammers*, 836 F.2d 750, 1998 AMC 1674 (2d Cir. 1988); *In re S & E Shipping Corp.*, 678 F.2d 636, 1982 AMC 2359 (6th Cir. 1982); *In re Ross Island Sand & Gravel*, 226 F.3d 1015, 2003 AMC 2913 (9th Cir. 2000); *In re Two R Drilling Co.*, 943 F.2d 576, 1992 AMC 1714 (5th Cir. 1991); *Newton v. Shipman*, 718 F.2d 959, 1984 AMC 2792 (9th Cir. 1983); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 1980 AMC 2803 (8th Cir. 1979).

[910] 765 F. Supp. 1264, 1992 AMC 594 (W.D. La. 1991).

[911] See, e.g., *Gregory v. Mucho K, Inc.*, 578 F.2d 1156, 1979 AMC 986 (5th Cir. 1978); *Anderson v. Nadon*, 360 F.2d 53 (9th Cir. 1966); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960); *In re Red Star Barge Line, Inc.*, 160 F.2d 436 (2d Cir. 1947); *In re Businelle Towing Corp.*, 539 F. Supp. 609, 1983 AMC 1814 (M.D. La. 1982).

Transport Co. v. Oklahoma,[912] although the stipulations made by the claimants are generally consistent with the requirements for a valid stipulation, however, the single largest property loss claimant - the state of Oklahoma refused to stipulate to the federal court's exclusive jurisdiction over shipowner's right to limit liability and made reservation in a footnote to the stipulation by expressly reserving and realleging its entitlement to sovereign immunity. The court concluded that the state of Oklahoma's immunity reservation rendered the stipulation insufficient as a matter of law.[913]

Even where there are multiple claimants and inadequate funds to satisfy all claims, the two exceptions recognized by the U.S. Supreme Court could be extended by way of additional stipulations filed by the claimants so as to lift the limitation court's stay. The circuit courts have universally acknowledged that claimants may transform a multiple-claims-inadequate-fund situation into the functional equivalent of a single claim case through appropriate stipulations outlining the priority by which the claims brought by multiple claimants will be satisfied from the limitation fund.[914] For example, in *Texaco, Inc. v. Williams,*[915] it was held that multiple claimants may reduce their claims to the equivalent of a single claim by stipulating to the priority in which their claims will be paid from the limitation fund.

By entering such priority stipulations, the multiple claimants decide among themselves which claims will be paid first out of the limitation fund, should the limitation court decide the owner is entitled to limit, so that the shipowner will not be exposed to competing judgments in excess of the limitation fund.[916] For example, although a claim by a spouse for loss of consortium, along with the related injury claim, presents a case with multiple claims, a stipulation giving priority to the injured spouse's claim will allow a lifting of the stay.[917]

In addition to the use of priority stipulations, a multiple claimant situation could be transformed into a single claim situation through the abandonment of claims.[918] However, to achieve this result, the claimant must unconditionally abandon the claim prior to the lifting of the federal stay.[919][920]

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[912] 366 F.3d 1153, 2004 AMC 1249 (10th Cir. 2004).

[913] Joseph E. Lee III, Stuart P. Sperling, *The Eleventh Amendment, the Flotilla Doctrine, and Other Flanking Maneuvers: Recent Efforts by Claimants to Avoid the Application of the Limitation of Shipowners' Liability Act*, 29 Tul. Mar. L.J. 1, 8-12 (2004).

[914] For an excellent discussion of this situation in the context of the two traditional situations in which the claimant(s) may be allowed to proceed outside the *concursus*, see *Gorman v. Cerasia,* 2 F.3d 519, 525-27, 1994 AMC 583, 591-94 (3d Cir. 1993). See also *Magnolia Marine Transp. Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1994 AMC 303 (5th Cir. 1992); *In re Dammers*, 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988); *In re S & E Shipping Corp.*, 678 F.2d 636, 1982 AMC 2359 (6th Cir. 1982); *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1996 AMC 2734 (11th Cir. 1996); *In re Mr. Wayne*, 729 F. Supp. 1124, 1990 AMC 570 (E.D. La. 1989)

[915] 47 F.3d 765, 1995 AMC 1912 (5th Cir. 1995)

[916] Jill A. Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Tul. Mar. L.J. 659 (2000)

[917] See Madeleine M. Landrieu, *Stipulations: Sidestepping the Limitation of Shipowners' Liability Act*, 23 Tul. Mar. L.J. 429 (1999). For a sample stipulation form, see p.447-48.

[918] For example, in *Anderson v. Nadon,* 360 F.2d 53 (9th Cir. 1966), claimants filed four separate claims against the shipowner. It was held that the written relinquishment of the claims and an offer to abandon the third claim provided an adequate alternative to the filing of priority stipulations and would justify the lifting of the stay against state court action.

[919] In *In re Boraks,* 142 F. Supp. 364, 1956 AMC 1342 (D. Mass. 1956), the second claimant offered to abandon his claim if the shipowner were found to be entitled to limit liability. The court rejected the

As to whether shipowner's right to seek exoneration in federal court should be included in the stipulation, it has been made clear there is no requirement that a claimant must stipulate to the shipowner's right to have exoneration determined by a federal court.[921] While exoneration was not wholly separate from limitation, it was not an issue that was exclusively reserved to the federal court. In a word, an exoneration stipulation is not necessary. In *Lewis v. Lewis & Clark Marine, Inc.*[922] the Supreme Court has determined that when a claimant has provided the appropriate stipulations and thereby is allowed to pursue his claim in state court, the only issue reserved exclusively to the federal court is limitation.[923] There is no basis for extending the shipowners' rights to grant exclusive jurisdiction over exoneration as well as limitation to federal courts.[924] The state court is competent to decide if the vessel owner is liable or not; the federal district court then decides whether the shipowner is entitled to limit his liability, based on whether the shipowner had privity or knowledge of the negligence arising from the incident.[925]

7.2.3.3 Time Limitation

Under the U.S. law, there is a unique provision of time limitation for the commencement of limitation proceedings which requires that the shipowner petition for limitation within six months after a claimant shall have given to or filed with such owner written notice of claim.[926] This six-month time limit is jurisdictional and has been strictly defined by the court; failure to timely petition can result in dismissal of the complaint. Therefore, the shipowners have to act promptly to benefit from the statutory right to limit liability.[927]

The six-month time bar starts to run when the owner receives written notice from a claimant (or someone properly authorized to give it on his behalf) who seeks damages from a particular casualty involving the vessel. It is not easy to determine what constitutes written notice of a claim as required by the statute. Obviously, to trigger the six-month time limitation, the notice given should be of a claim subject to limitation under the Limitation Act.[928] Service of summons and complaint is usually sufficient notice.[929] Jurisprudence shows that the notice of claim cannot merely

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claimant's offer, noting that the condition the claimant placed on abandonment was merely a "palliative device patently adopted for procedural maneuvering."

[920] See Michael L. Bono, *Protective Stipulations And The Single Claimant Exception In Limitation Of Liability Proceedings*, 17 Tul. Mar. L.J. 257 (1993)

[921] See *In re Tetra Applied Techs.,* 362 F.3d 338, 2004 AMC 841 (5th Cir. 2004).

[922] 531 U.S. 438, 2001 AMC 913 (5th Cir. 2001).

[923] This view has already been expressly confirmed by the U.S. courts in *In re Tidewater Inc*., 249 F.3d 342, 2001 AMC 1791 (5th Cir. 2001) and *Riverview Harbor Service, St. Louis, Inc. v. Bridge & Crane Inspection, Inc.*, 263 F.3d 786 (8th Cir. 2001).

[924] See Matthew Guy, *In re Tetra Applied Technologies: The Saving to Suitors Clause vs. The Right to Seek Exoneration in Federal Court: Exoneration Is Not the Same as Limitation*, 29 Tul. Mar. L.J. 503, 504-505 (2005)

[925] See George Tadross, *The Saving to Suitors Clause vs. The Limitation of Liability Act: A Compromise as Found in Lewis v. Lewis & Clark Marine, Inc.*, 26 Tul. Mar. L.J. 695 (2002)

[926] See 46 U.S.C. 185; Fed. R. Civ. P. Supp. F(1) (in slightly different language).

[927] See, e.g., *In re Goulandris*, 140 F.2d 780, 1944 AMC 357 (2d Cir. 1944); *Complaint of Morania Barge No. 190, Inc.*, 690 F.2d 32 (2d Cir. 1982).

[928] See *Jung Hyun Sook v. Great Pacific Shipping Co.*, 632 F.2d 100, 1981 AMC 1232 (9th Cir. 1980).

[929] See, e.g., *Cincinnati Gas & Elec. Co. v. Abel*, 533 F.2d 1001 (6th Cir. 1976); *In re Union Mechling*, 1976 AMC 2301 (S.D. Ill.); *The Belleville,* 35 F. Supp. 934 (E.D.N.Y. 1940).

describe damage or the facts from which it arises, but must clearly assert liability on the part of the owner. That is, the written notice must expressly inform the shipowner of the claimant's intent to seek damages.[930] For example, in *Complaint of Southcoast Watersport Rentals, Inc.*,[931] the court held that when the letter sent by the claimant's attorney to the shipowner set forth the facts of collision and negligence of the person for which the shipowner was responsible and inquired about the settlement of the claims, it was sufficient notice of claim to trigger the six-month period. Whereas, in *In re Salty Sons Sports Fishing*,[932] it was held that correspondence from claimants' attorney to shipowners which did not inform the shipowners of the claimants' demands, blame the owners for the loss, or inform the owners that the damages might exceed the value of the vessel did not start the six-month time limitation.[933]

It is not required to include the exact amount of damages in the notice of claim for purposes of starting the six-month period.[934] However, the written notice should be of claims which, in all reasonable probability, will exceed the value of the vessel and her pending freight. For example, in *In re Moraine Barge No. 190, Inc.*,[935] the amount of damages originally claimed by the claimant was below the statutory limit and was later increased by an amendment to the bill of particulars. The court held that the shipowner was not required to file a limitation petition until after the claimant amended its complaint and bill of particulars to increase its claim by the amount exceeding the statutory limits of liability.[936] Furthermore, the shipowner must file the complaint within six-months upon receipt of the first qualified written notice of the claim.[937] Subsequent notices of additional claims do not give rise to separate six-month periods within which the owner may file the limitation complaint.[938]

As was stated previously, while a shipowner may only file a complaint for limitation in a federal district court, the owner may also plead limitation as a defense in a pending proceeding seeking damages, which usually means the claimant's state court suit. While there is no controversy about limitation defense in a state court case, there has been confusion as to whether the state court has the power to adjudicate the substantive limitation issues, since the right to assert the limitation defense has been jeopardized by the courts in *Cincinnati Gas & Electric Co. v. Abel*[939] and *Vatican*

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[930] See, e.g., *Complaint of Tom-Mac, Inc.*, 76 F.3d 678 (5th Cir. 1996); *Moreira v. Lemay*, 659 F. Supp. 89 (S.D. Fla. 1987); *Complaint of Beesley's Point Sea-Doo, Inc.*, 956 F.Supp. 538 (D.N.J. 1997); *In re American M.A.R.C., Inc.*, 224 F. Supp. 573 (S.D. Cal. 1963); *Billiot v. Dolphin Services, Inc.*, 225 F.3d 515, 2001 AMC 259 (5th Cir. 2000). Shipowners should be given fair and reasonable opportunities to evaluate the potential liability based upon reasonably accurate information about the claims in order to make an informed decision on whether to file a limitation complainnt or not.

[931] 954 F.Supp. 260 (S.D.Fla. 1996).

[932] 191 F. Supp. 2d 631, 2002 AMC 1323 (D. Md. 2002).

[933] See Schoenfeld & Butterworth, *Limitation of Liability: The Defense Perspective*, 28 Tul. Mar. L.J. 219, 221-223 (2004).

[934] See, e.g., *Complaint of Beesley's Point Sea-Doo, Inc.*, 956 F.Supp. 538 (D.N.J. 1997).

[935] 690 F.2d 32 (2d Cir. 1982). See also *Van Le v. Five Fathoms, Inc.*, 792 F. Supp. 372, 1992 AMC 2563 (D.N.J. 1992)

[936] See Jill A. Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?* 24 Tul. Mar. L.J. 659, 672 (2000)

[937] See *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 1989 AMC 1480 (9th Cir. 1989).

[938] Staring, *Limitation Practice and Procedure*, 53 Tul. L. Rev. 1134 (1979)

[939] 533 F.2d 1001, 1976 AMC 567 (6th Cir.), cert. denied, 429 U.S. 858 (1976). The basic holding of this case indicates correctly that the assertion of the limitation defense in a state court suit will not extend the six-month period within which to file for limitation under section 185 in an admiralty court.

Shrimp Co. v. Solis[940] which implied that only an admiralty court has the power to decide limitation of liability issues. Therefore, it might be risky to rely upon limitation as a defense, in view of the short statutory time limitation for the commencement of limitation proceedings,

It was made clear in *Mapco Petroleum, Inc. v. Memphis Barge Line, Inc.*[941] that a state court is empowered to decide the applicability and merits of a limitation of liability defense when the shipowner asserted as a defense its right to seek limitation of liability pursuant to 46 U. S.C. 183. Indeed, there are quite a few federal and state court authorities supporting the jurisdiction of the state court to fully determine the shipowner's limitation rights under the limitation statute.[942] Absent a pending limitation proceeding in the federal court, a state court has the power to fully adjudicate a limitation defense.[943] In *Howell v. American Cas. Co. of Reading,*[944] the court followed the *Mapco* opinion and held that state courts do have jurisdiction to consider a limitation defense when a shipowner elects to have defense heard in state court by affirmatively pleading it in the answer instead of filing a limitation proceeding in federal court. Similarly In *Sana v. Hawaiian Cruises, Ltd.,*[945] it was held that a vessel owner may amend its answer to include limitation as a defense, even after the six month limitation for filing a separate limitation proceeding has passed.

Conclusion

Substantive laws on limitation of liability may become operational only if they are implemented consistently and effectively by the corresponding procedural rules. However, as we have seen, there is less uniformity in respect of procedures for limitation of liability. Both the 1957 and 1976 Limitation Conventions provide for procedural matters to some effect, which are aimed to coordinate the proceedings in different courts and provide for their international recognition. However, the Limitation Conventions leave the procedural aspects of limitation of liability largely to the domestic laws. It is generally recognized that limitation of liability may be invoked either by commencing a limitation action, or as a defence in the liability action. Obviously, a limitation action is designed to marshal the claims against a shipowner and to distribute the limitation fund proportionally between the claimants. The 1976 Convention contains more specific provisions for the constitution and distribution of the fund as well as bar to other actions than the 1957 Convention.

Under the U.K. law, the procedural rules contained in the 1976 Convention are essentially applicable in the U.K. Furthermore, the Civil Procedure Rules, together with the supplemental Admiralty Practice Direction govern those practice rules relating to limitation procedures.

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[940] 820 F.2d 674, 1987 AMC 2426 (5th Cir.), cert. denied, 484 U.S. 953, 1988 AMC 2403 (1987).

[941] 849 S.W.2d 312, 1993 AMC 2113 (Tenn.), cert. denied, 114 S. Ct. 64 (1993).

[942] See, e.g., *Murray v. N.Y. Cent. R.R.*, 287 F.2d 152 (2d Cir.), cert. denied, 366 U.S. 945 (1961); *Deep Sea Tankers v. The Long Branch*, 258 F.2d 757 (2d Cir. 1958), cert. denied, 358 U.S. 933 (1959); *The Chickie*, 141 F.2d 80 (3d Cir. 1944).

[943] See generally, Kenneth H. Volk, *Limitation of Liability and the Tennessee Supreme Court*, 27 J. Mar. L. & Com. 305 (1996)

[944] 691 So.2d 715, 1997 AMC 1739 (La. App. 4th. Cir. 1997).

[945] 181 F.3d 1041, 1999 AMC 1831 (9th Cir. 1999)

In China, it is the Special Maritime Procedure Law, together with the Supreme Court Interpretations that primarily govern the procedural aspects relating to limitation of liability. These laws have introduced detailed provisions in respect of procedures for constituting a limitation fund and procedures for registration and payment of claims. Regretfully, this Procedure Law doesn't make comprehensive provisions on the procedures of limitation proceedings. The confusions incurred in judicial practice may be solved sooner or later by the interpretation from the Supreme Court or eventually via amendment of the Procedure Law.

In the U.S., Section 185 of the Limitation Act together with Rule F of the Supplemental Rules establishes the procedural framework for limitation proceedings. *Concursus* of claims, i.e. all claims against the shipowner must be brought in a single proceeding in the same venue, is the essential feature of the U.S. limitation statute. In attempting to resolve the conflict between the exclusive jurisdiction of the admiralty courts over limitation issues and the right of the claimant to proceed against the owner in state court under the saving to suitors clause, the U.S. jurisprudence has developed two exceptions where a claimant should be allowed to pursue his state court action, i.e, the single claimant situation and the adequate fund situation, for which the claimants must file certain stipulations. The six-month time limitation within which to petition limitation of liability is another distinctive provision under the U.S. limitation law to urge the shipowners to act promptly.

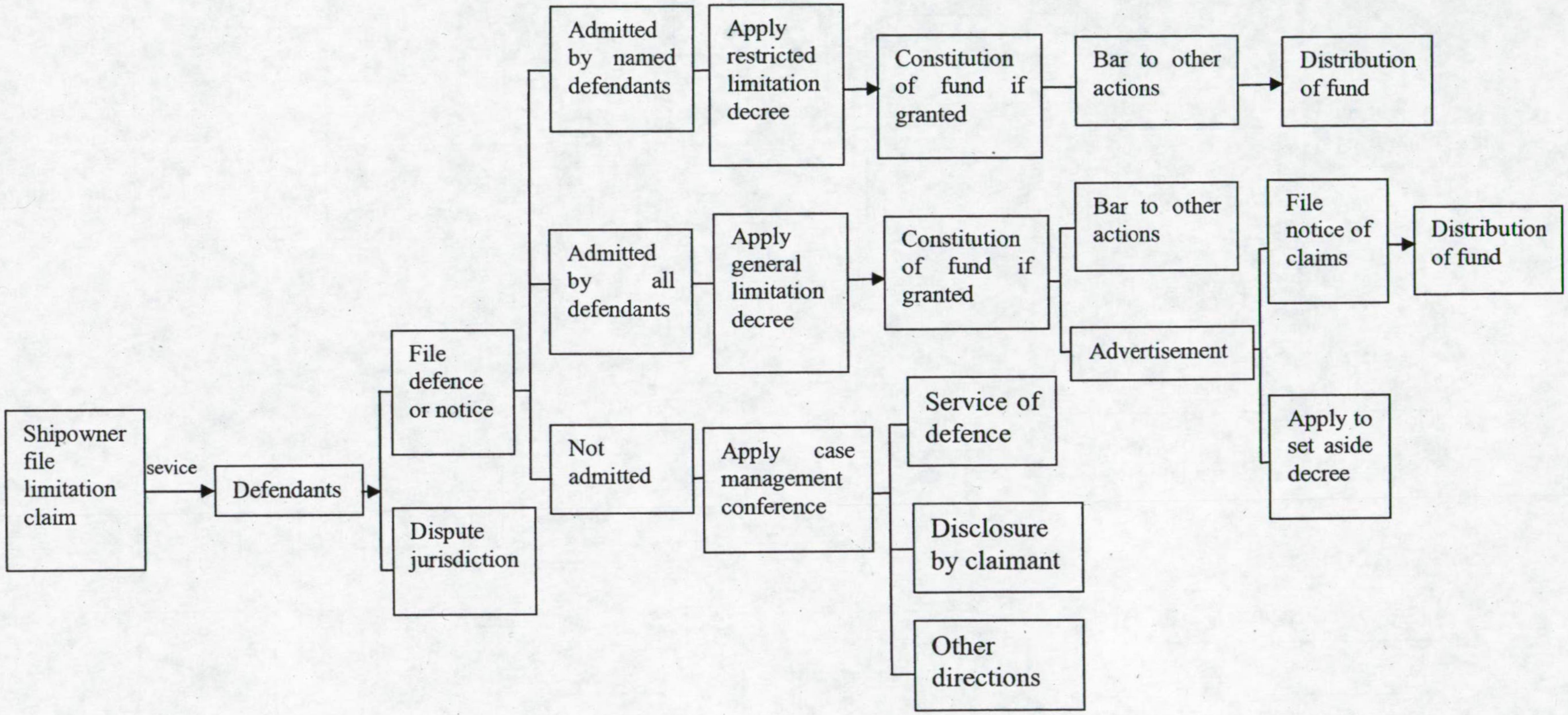
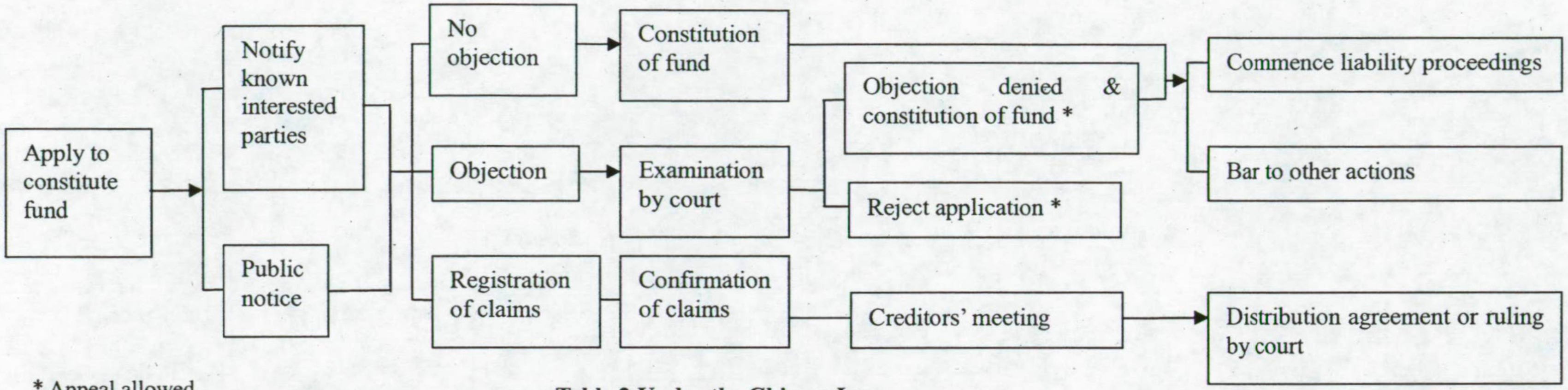


Table 1 Under the U.K. Law



* Appeal allowed

Table 2 Under the Chinese Law

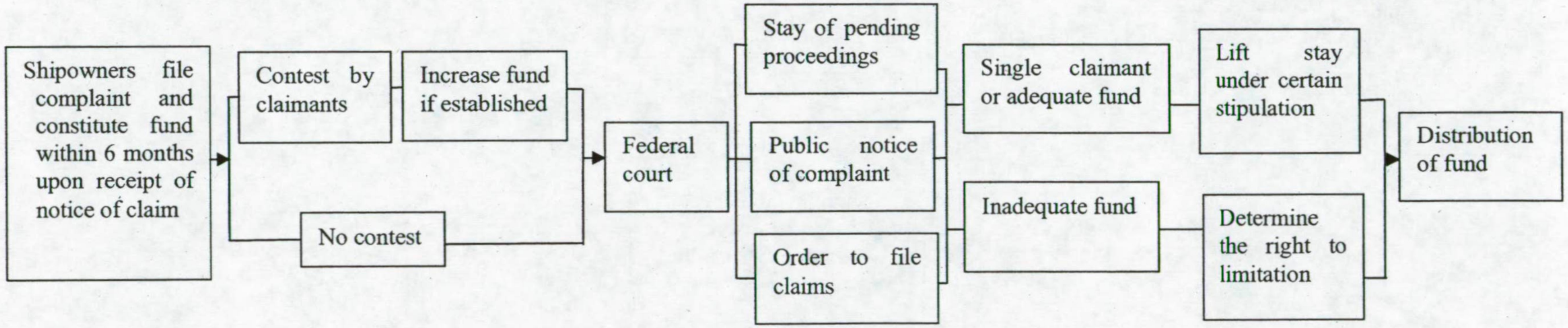


Table 3 Under the U.S. Law

General Conclusion

Limitation of liability for maritime claims is a generally accepted maritime law regime amongst shipping countries. As the original underlying rationale of promoting shipping industry has changed and new commercial practices such as insurability of maritime liability have arisen, this regime has evolved to remain viable by keeping in line with the present reality of the maritime industry and balancing various interests of the parties involved. The public policy considerations behind successive conventions and statutes relating to the limitation of liability from the 17th century until now has been to extend the privilege of limitation in order to keep pace with developments in the shipping industry. As we can see, the right to limit has been extended from shipowners to charterers, operators, managers, salvors and liability insurers, and from claims for physical damage to claims for infringement of rights, delay etc.

This paper has covered and examined issues related to global limitation regime in the previous chapters, such as the scope of vessels and persons entitled to limit, what types of claims are subject to or excluded from limitation, conduct barring this limitation privilege, size of limits of liability, as well as procedures and practices in respect of invoking the limitation.

In the international context, there have been several conventions which deal with global limitation of liability with the purpose of achieving higher level of uniformity. However, the international efforts for uniformity in this area are not so successful as intended to be. It is true that the majority of the world's shipping tonnage is currently covered by reference to the 1957 or the 1976/1996 Conventions. As of 2008, there are about 30 Contracting States to the 1957 Convention,[946] 51 Contracting States to the 1976 Convention and 28 Contracting States to the 1996 Protocol to the 1976 Convention.[947] Nevertheless, some countries still apply the rules of the 1924 Limitation Convention, e.g. Brazil, or purely domestic rules, e.g. the U.S., or no limitation at all. Furthermore, some countries, although ratifying the 1976 Convention or the 1996 Protocol, have not denounced the earlier Convention.[948]

There are also some other factors that may interfere with the uniformity. Some state parties may make reservations when ratifying the limitation convention. Such reservations are in most cases the results of certain compromises by balancing various elements so as to enable the maritime nations to accept the convention. Furthermore, the approaches employed by the domestic legislature to implement or incorporate the international convention into domestic law may vary from state to state, therefore allowing for national deviation from the real meaning of the Convention provisions.

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[946] Please visit http://www.comitemaritime.org/

[947] Please visit http://www.imo.org/

[948] Article 30(4) of the 1969 Vienna Convention on the Law of Treaties provides that where two states are parties to a convention, that convention should be applied between them even if one of the states has ratified a more recent convention without denouncing the earlier one. It seems that a country which has ratified the 1976/1996 Convention without denouncing the earlier Convention will be bound by the latter in relation to other countries which apply that convention.

Some states implement the convention *en bloc*; whilst others amend their existing legislation to reflect the terms of the convention. Finally, different domestic courts, based on various considerations, may render different interpretations even for the same convention provisions, which will certainly contribute to the lack of uniformity.[949]

With regard to domestic legislations on limitation of liability, the U.K. government has always kept pace with the development of the international limitation convention. At present, the 1976 Convention and its 1996 Protocol have been incorporated into the U.K. law *en bloc* (notwithstanding some reservations) by the 1995 Merchant Shipping Act and its Amending Order of 1998 to govern the global limitation of liability. In addition, the U.K. jurisprudence has provided plentiful in-depth case analysis to enhance the development of its limitation law.

While China, although not adopting any of the international limitation conventions, has closely followed the general principles as contained in the 1976 convention. Based on comprehensive considerations of modern problems and practices in the maritime industry, Chinese legislators have decided to select and incorporate those provisions of the convention which suit their needs into domestic law. The substantive and procedural provisions regarding limitation of liability for maritime claims can be found in the Maritime Code and the Special Procedure Law respectively. These statutes together with other pertinent legislations have made a significant impact on both domestic and international shipping and trade industries as well as marine insurance. China is currently progressing towards a more international direction and adopting more and more internationally recognized principles and practices. It is making great efforts to establish a predictable and unified maritime legal system to meet the needs of its economic development and maritime trade. Inevitably, on the way to becoming more internationalized, many problems will arise in coordinating domestic laws with international rules and practices. Therefore, as elaborated in the previous chapters, certain provisions in the Maritime Code or Special Procedure Law are found not drafted as well as they might have been, and accordingly need to be further clarified or amended.

The U.S. has its own peculiar limitation of liability statute. However, the judiciary has demonstrated open hostility towards this limitation system, primarily due to its outdated post-incident system for calculating the limitation fund. Obviously, limitation of liability under the U.S. law is out of step with international regime. It is submitted that the U.S. revitalize its present limitation laws and adopt the principles contained in the 1976/1996 Convention promptly, especially the tonnage system. This will ensure adequate compensation for claimants and avoid various maneuvers and efforts employed by the judiciary to circumvent the limitation to reach *de facto* repeal of the statute. Since the U.S. is a leading maritime nation, its adherence to the international convention regime will certainly contribute to the uniformity of limitation law.

To sum up, today different jurisdictions around the world apply different limitation regimes due to diversity of economy, culture and political development. Consequently, shipowners or claimants may well go shopping for a limitation regime of some

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[949] See, e.g., the interpretation of Article 4 of the 1976 Convention on conduct barring limitation by the French Court in *The Heidberg,* [1994] 2 Lloyd's Rep. 287.

particular jurisdiction more favorable to them than other available ones. Their decision is mostly not based upon the perceived merits of the particular limitation regime such as justice, fairness and harmony of law but on which regime favor their financial interests on the facts of the particular case. In fact, forum shopping and choice of law is an inevitable phenomenon so long as there are differences in procedural and substantive laws of various jurisdictions.

As is discussed previously, there are substantial differences between existing limitation systems, no matter convention regimes or domestic regimes. Therefore, shipowners or claimants have to take into account all the relevant factors when determining to proceed in a particular forum, such as jurisdiction and enforcement, security, scope of persons entitled to limit and claims subject to limitation, the amount of the limitation fund, standard for breaking limitation, burden of proof, choice of laws, recognition and enforceability of the limitation decree in other jurisdictions.[950]

Usually, the claimants will prefer to sue in a jurisdiction with higher limits of liability or where there is a higher likelihood of breaking the limitation, e.g., under the U.S. law. In contrast, the shipowners will seek to commence a limitation action in the jurisdiction with lower limits of liability if there is no prospect of breaking the limit under available laws,[951] or alternatively where the law provides an almost unbreakable standard of intent or recklessness for breaking limitation if there is risk of being denied limitation under other laws.[952] Therefore, following an incident, early consideration of the limitation regimes available in competing jurisdictions is highly important. For those shipowners or claimants who wish to go shopping for forums with limitation regimes favorable to them, they should have knowledge of the limitation laws in all the possible forums and also how the domestic courts have interpreted the relevant provisions.[953]

The financial advantages to the shipowner or claimant of one limitation regime rather than the other could be so substantial that it has led to quite a few jurisdictional disputes.[954] Some conventions specifically deal with preventing parallel proceedings

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[950] See Simon Gault, *Limitation procedure and forum shopping*, Conference of Limitation of Liability 1998, University of Southampton

[951] See, e.g. *The Herceg Novi* [1998] 1 Lloyd's Rep. 167, [1998] 2 Lloyd's Rep. 454.

[952] See, e.g., *Caspian Basin Specialized Emergency Salvage Administration v. Bouygues Offshore SA (No. 4)* [1997] 2 Lloyd's Rep. 507.

[953] See, e.g., *The Hack Duck No.1*, where the claimant chose to proceed in Malaysia hastily without sufficient investigation of the local law, with the result of obtaining limits of liability much less than in other available jurisdictions. See Zhang Liying, *Maritime Law: Principles, Rules and Cases*, Qinghua Univ. Press (2006), p.153 (quoted from *Compilation of Ocean Shipping Materials (4)*, p. 146)

[954] There are a number of cases that involve the difficulties arising from application of more than one limitation regime internationally. See, e.g., *The Xin Yang* (1996) 2 Lloyd's Rep 217; *The Volvox Hollandia* [1988] 2 Lloyd's Rep. 361; *de Dampierre v. de Dampierre* (1988) 1 A.C. 92*; The Falstria* (1988) 1 Lloyd's Rep. 495*; Caltex Singapore Pte Limited v. BP Shipping Ltd.* [1996] 1 Lloyd's Rep. 286*; The Kapitan Shvetsov* [1998] 1 Lloyd's Rep. 199*; The Herceg Novi* [1998] 1 Lloyd's Rep. 167, [1998] 2 Lloyd's Rep. 454*; The Happy Fellow,* [1997] 1 Lloyd's Rep. 130, [1998] 1 Lloyd's Rep. 13; *Bouygues Offshore, S.A. v. Caspian Shipping Co. (Nos.1, 3, 4 and 5)* [1998] 2 Lloyd's Rep. 461; *Bouygues Offshore SA v. Caspian Shipping Co. (No. 5)* [1997] 2 Lloyd's Rep. 533; *Spiliada Maritime Corp. v. Cansulex Ltd.)* [1987] 1 AC 460, [1987] 1 Lloyd's Rep. 1; *Caspian Basin Specialized Emergency Salvage Administration v. Bouygues Offshore S.A. (No. 4)* [1997] 2 Lloyd's Rep. 507; *Evergreen International SA v. Volkwagen Group Singapore Pte Ltd. and others (Ms Ever Glory – Ms Hual Trinita)*, [2003] SGHC 142 (quoted from European Transport Law 206 (2005)).

and thus avoiding the risk of irreconcilable judgments being given in more than one jurisdiction, a situation which might lead to absurdity on enforcement of those judgments. The most significant one is the E.C. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Jurisdiction Convention). This Convention was incorporated into European Community Law and replaced by the Council Regulation 44/2001 from March 1, 2002. Notwithstanding the transformation in form, the substance of the provisions remains substantially the same, except the numbering of the articles has been changed.[955] Since the limitation conventions lack provisions on jurisdiction and enforcement of judgment in limitation actions, there is wide concern upon the relationship between these conventions and the Council Regulation.[956] Indeed, this has already illustrated by the case law.[957]

It should be noted that the parties need to know not only in which jurisdiction to commence proceedings but also which choice of law rules will be applied to determine which law governs the limitation of shipowners' liability. Many maritime nations adopt *lex fori* to resolve choice of law issues in respect of limitation of liability, notwithstanding by which law the claims are brought.[958]. For example, under the English practice, limitation of liability is characterized as procedural in nature. As such, the law of the forum will apply.[959] Similarly, according to Article 275 of the China Maritime Code, limitation of liability for maritime claims is also governed by the law of the place where the court entertaining the case is located, that is, *lex fori*. While in the U.S., the choice of law principles in limitation cases are not that consistent and have become unnecessarily confusing. Over the years, various theories have been developed by the U.S. courts to resolve choice of law issues regarding shipowner's limitation, such as law of the forum, procedural/substantive dichotomy,

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See also Sally-Ann Underhill, *Limitation of liability: Forum shopping*, International Journal of Shipping Law, Part 2 June, 1998; Andrew Chamberlain, *Forum Shopping for a Favorable Limitation Regime not entirely dead*, Lloyd's List, 1999; N Teare, *More Limitations Upon the Right to Limit Under the Limitation Convention 1976*, [2004] L.M.C.L.Q. 143; Aleka Mandaraka-Sheppard, *Forum Non Conveniens or Forum Shopping by way of Limitation Actions*, 3 Journal of International Maritime Law 43 (1999)

[955] See generally, Henrik Ringbom, *EU Regulation 44/2001 and its Implications for the International Maritime Liability Conventions*, 35 J. Mar. L & Com. 1 (2004). Another Convention to the similar effect is the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988.

[956] See Peter Wetterstein, *Article 7 of the Brussels I-Regulation and limitation of liability*, 11 Journal of International Maritime Law 417 (2005)

[957] See, e.g., *Maersk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, Case C-39/02 European Court of Justice, [2005] Lloyd's Rep 210. See *Analysis and Comment: Maersk Olie & Gas A/S v. Firma M. de Haan en W. de Boer,* 11 Journal of International Maritime Law 92 (2005); Malgorzata Anna Nesterowicz, *Lis Pendens by Convention: Concurrent Application of the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships (1957) and the EC Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial matters (1968). Maersk Olie & Gas A/S v. Firma M. de Haan en W. de Boer. 2004 E.C.R. (E.C.J. 2004)*, 36 J. Mar. L. & Com. 141 (2005)

[958] However, there are other jurisdictions in which the courts refuse to do so. See, e.g., *Universal Overseas Ltd. v. M.S. Sylt I Schiffahrtsgesellschaft (The Sylt)*, Feb. 28 1992, Hoge Raad, where it was held by the Dutch Supreme Court that there is a strict link between the law governing the claim and that governing the limitation of liability.

[959] See, e.g., *Caltex v. BP* [1996] 1 Lloyd's Rep. 286; *The Happy Fellow* (1997) 1 Lloyd's Rep 130, (1998) 1 Lloyd's Rep 13.

and interest analysis approach.[960] In most cases, American courts have managed to apply the U.S. law, i.e., the *lex fori* and refused to recognize foreign limitation procedures and decrees.[961]

Probably there will never be a complete solution for forum shopping if the differences in the limitation laws of various jurisdictions persist. Uniformity is particularly important in the area of limitation of liability for the international maritime community to discourage forum shopping, and to create an atmosphere of cooperation and certainty. As long as countries still apply different Convention provisions or their own domestic systems, the claimants or shipowner will continue to seek the most favorable limitation regime.

It is encouraging to note that more and more maritime countries have rarified or intend to ratify the 1976/1996 Convention, or adopt substantial provisions of this Convention into domestic legislations. Certain degree of unification has been reached in respect of the substantive aspects of limitation of liability. However, there is still a considerable range of variation between states parties in the application of the 1976 convention. It is recognized that there is very big diversity in the way that the convention has been implemented and in the way it is interpreted and applied in the context of the national legislation of various countries. Knowledge of the manner in which provisions of the Convention have been interpreted by the national courts would increase the prospects of their uniform interpretation. For that purpose, the CMI has initiated the work in an attempt to unify, at least in part, the national procedural rules in respect of limitation of liability under the various international conventions, in particular, the 1976 LLMC Convention, the CLC and the HNS Convention. Some guidelines might be drafted for a more harmonized application of the relevant conventions. It is to be hoped international uniformity of limitation law being achieved to the most possible extent in the future with the endeavors taken collaboratively by all the maritime nations.

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[960] See e.g., *The Scotland* 105 U.S. 24 (1881); *The Titanic* 233 U.S. 718 (1914); *The Norwalk Victory* 336 U.S. 386 (1949); *The Yarmouth Castle* 266 F. Supp. 517 (S.D. Fla. 1967), 1967 AMC 1843 (S.D. Fla., 1967); *The Steelton* 435 F. Supp. 944, 1977 AMC 2203 (N.D. Ohio 1976), aff'd 631 F.2d 441, 1980 AMC 2122 (6th Cir. 1980); *The Arctic Explorer* 590 F. Supp. 1346, 1984 AMC 2413 (S.D. Tex. 1984); *The Swibon* 596 F. Supp. 1268, 1985 AMC 722 (D. Alas. 1984).

[961] See William Tetley, *Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law*, 23 J. Mar. L. & Com. 585 (1992), in which a complete methodology was adopted to solve the classic conflict problems concerning limitation of liability. See also, Biezup & Abeel, *The Limitation Fund and Its Distribution*, 53 Tul. L. Rev. 1185, 1190-1195 (1979)

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